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PRINCIPLES

OF

HINDU AND MAHOMEDAN LAW

BY THE LATE

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AND EDITED BY

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PREFACE TO THE NEW EDITION.

SIR WILLIAM MACNAGHTEN'S Principles of Hindu and Mahomedan Law is a standard work of great authority in this country. Professor Wilson's Edition of the same published in 1862, has no marginal Notes, nor Index to ensure facility of reference. The Editor has therefore thought proper to publish the present edition, and in order to make it as useful to the Public as possible, he has given the marginal Notes, a copious Index and the Preliminary Remarks on Hindu and Mahomedan Law, together with an Appendix containing the Regulations and Acts having reference to the subjects. Regulation VII. of 1832, Sections 8 and 9, Acts XXI. of 1850, XV. of 1856, and XXI. of 1870. In the foot notes recent important Rulings on Hindu Law have been referred to, and a Chart of *Sapindas* and *Samanodacas*, and their Order of Succession according to the *Mitácshará*, also a Table of Succession according to the Bengal School —have been added.

The Editor trusts that this edition will meet with the approbation of the Public, and if it does, he will be glad to publish a cheap edition of the Precedents of Hindu and Mahomedan Law.

GIRISH CHANDRA TARKALANKAR.

CALCUTTA,
June, 1873.

PRELIMINARY REMARKS.

So MUCH has, of late years, been written on the subject of Hindu Law, that any addition to the information already communicated, may at first sight be regarded as altogether superfluous. In Bengal, there has been recently published a work entitled Considerations on Hindu Law as current in that province; besides which, the stock of reported Cases, involving questions connected with that law, has been very considerably augmented. In the publication called the Elements of Hindu Law, we find a sketch of the jurisprudence in question. Conformably to the system in force at Madras, together with an Appendix, containing the replies of the Pundits, (or as they have been termed by the Compiler, the *responsa prudentum*,) with reference to cases actually brought under litigation in the several civil courts subordinate to that presidency; while the Reports of Cases decided in the Sudder Adawlut at Bombay, and a work published at the same presidency under the appellation of a Summary of Hindu Law, have afforded valuable information regarding the laws and customs of the Hindu population on that side of India. There still, however, remained a desideratum, which I have here

endeavoured to supply. It still remained to state the Law, and its varieties as current throughout the extensive territories subject to the presidency of Bengal, and to furnish a collection of precedents of points already determined, which might serve as a safe, because an uninterested, guide, to the correct decision of future and similar questions.

"If books and laws," observed Dean Swift, "continue to increase as they have done for fifty years past, I am in some concern for future ages, how any man will be learned, or any man a lawyer."* Such a complaint could not with justice be made of publications relating to the Hindu law, or of that law itself, to which there have been no modern additions, and our knowledge of which may be said to be as yet in its infancy. It is not likely that works on this subject will ever attain to an overwhelming number. Few men have leisure to become acquainted with the law in an English dress, and still fewer to study it in the original. The civil functionaries of this country, from the first moment of their entry into public life, for the most part find their time and attention so completely absorbed in the discharge of their indispensable and current official duties, as to render it hopeless for them to attempt to acquire a knowledge of those laws which they are bound to administer. In such a state of things, it must be admitted, that any information which may be turned to account in practice, cannot but be eminently useful—nor does there appear to

* Thoughts on various subjects.

be any better method of solving judicial doubts, than by resorting to decisions already passed, the accuracy of which may generally be admitted, and the impartiality of which can never be denied.

It has been my object in this work, to fix doubtful points regarding which a contrariety of opinion has hitherto prevailed; and passages from the publications above alluded to have not unfrequently been cited in corroboration of the doctrines which I have adopted. Though I have satisfied myself, I am aware it by no means follows that others should be convinced with the same facility: but it is certainly true, that questions of the highest importance, and which are of every-day occurrence, should be finally determined in one way or another. The mode is nothing:—the determination is every thing. It matters little, for instance, to the community at large, whether a father shall be held to have the right of conferring his ancestral real property on one son, to the exclusion of the rest; but it is of the highest importance to every member of the community, that the rights and privileges of each should, as far as practicable, be defined and established.

I apprehend that the Hindu law, in its pure and original state, does not furnish many instances of uncertainty or confusion. The speculations of commentators have done much to unsettle it, and the venality of the Pundits has done more. It was remarked by Paley, that "after all the certainty and rest that can be given to points of law, either by the interposition of the legislature or the authority of

precedents, one principal source of disputations, and into which indeed the greater part of legal controversies may be resolved, will remain still, namely, the competition of opposite analogies."* But this source of uncertainty should not exist in the system here treated of. The Pundits are called upon, not in the character of advocates to urge different analogies, but as faithful expositors of existing written law with relation to simple facts distinctly stated. There is not any contention of the bar in such matters, and there ought not to be the exercise of any ingenuity. It may seem harsh and unjust to pass an indiscriminate censure upon any body of men: but while I admit, that there are not wanting among them individuals of unimpeachable honesty and profound erudition, I am still of opinion, that to the Pundits is chiefly attributable the perplexity of the system which it is their province to expound. The difficulty of detection is tempting; and, where the law is perverted, the perversion is seldom so glaring as to admit of exposure by superficial inquiry. Authorities are frequently cited in support of a particular doctrine, which are indeed genuine passages of law, but applicable to a question wholly different from the subject matter. Again, authorities may be cited, which are both genuine and applicable to the identical subject treated of, but which are of no weight in the particular province whose doctrine should have been adopted. Further facility for evasion is gained by the confu-

* Moral Philosophy, Book VI., Chap. 8.

sion between natural and civil obligations. This is the case in the Hindu law, especially as it obtains in the province of Bengal. It by no means follows, that because an act has been prohibited, it should therefore be considered as illegal. The distinction between the *vinculum juris* and the *vinculum pudoris* is not always discernible. That this should be the case, in a system containing so much of ethical ingredients, is not to be wondered at; but the principle of legalizing a breach of positive prohibitions, has been carried much further than could have been contemplated by the legislator. Every man is declared to be master of his own acquisitions. This is a maxim of law: but in the distribution of it, he should not show an undue preference to any individual member of his family. This is a precept of morality. By infringing the latter, the force of the former is not destroyed: consequently the undue preference in this case is not repugnant to law. But, on the other hand, a father and son have equal right to ancestral real property. This also is a maxim of law: and if an undue preference be shown in the disposition of this species of property, such act is not only at variance with the moral precept, but is repugnant to the positive law. It has nevertheless been contended, as will be more fully shown in the body of this work, that such act, if done, must be considered as legal to all intents and purposes. This question has been discussed at some length in the present compilation: and though it is not to be expected that the conclusions I have formed in this and

other instances should be considered as infallible guides, yet the grounds whereon they rest have been severally given, which may tend to show whether they should be acquiesced in or rejected. I may however be permitted to add, that these conclusions have not been arrived at without consulting books, and having recourse to the best available living authorities.

By Section 15, Regulation IV., 1793, re-enacted for Benares and the Upper Provinces by Regulation VIII. of 1795, §. 3, and Regulation III. of 1803, §. 16, it is provided, that in suits regarding succession, inheritance, marriage, and caste, and all religious usages and institutions, the Hindu laws with regard to Hindus, are to be considered as the general rules by which the judges are to form their decisions. Questions connected with the two first-mentioned points are frequently litigated in the established courts, while those originating in the last-mentioned sources of contention are for the most part adjusted by reference to private arbitration. These subjects have, therefore, been but slightly adverted to in the following pages, designed as the work is solely for the purpose of practical utility. The provision in the enactments above cited would appear to exclude cases of contract, evidence, and other miscellaneous matters; but there may be questions incidently involving these topics, and they may be so interwoven with cases which it is the duty of the courts to decide agreeably to the Hindu law, that attention to the principles of the one may be essential to the due adjudication of the other. For

instance, in a claim of inheritance, the defendant may plead a title by purchase, and the question will then arise as to how far the ancestor was at liberty to contract. So also in a case of disputed marriage, it may be a question as to how far the witnesses adduced in support of its validity may be considered competent or otherwise. This will involve some consideration of the law of evidence.

Ancient laws, pronounced to be obsolete in the present age, I have purposely omitted the mention of; such as the doctrines relative to the various descriptions of subsidiary sons, and those respecting the rights of sons by mothers of different classes, only three kinds of adoption being permitted or practised in the present age, and marriage with females of a different tribe being prohibited. The subjects discussed in this work are those of Inheritance, Partition, Marriage, Adoption, Minority, Slavery, Contracts (including Debt, Gift, and Sale), and Judicial Proceedings, being a translation of an extract from the *Vyavahâramâtrica Prukurn* of the *Mitácshará*, including the Law of Evidence and Pleading. A considerable portion of this, especially the chapter on Ordeals, might perhaps have been omitted without material detriment to the utility of the work; but I was induced to add it for the gratification of curiosity, no entire version having yet been made, to my knowledge, of this topic of *Hindu* jurisprudence. On their Law of Bailments I have not deemed it necessary to touch, as that subject has been amply discussed in the Digest translated by Mr.

Colebrooke, and epitomes of the same are contained in the Considerations on the Hindu Law as current in Bengal, as well as in the work entitled "Elements of Hindu Law."

It will be conceded, I imagine, that the rules affecting succession are clear, simple, and copious; that provision is made for almost every case that can possibly arise; and, making allowance for the different opinions which prevail in the different schools, and for a few disagreements among authors of the same school on points of minor importance, that there can be but little room for hesitation, when a question respecting inheritance is litigated, and little reason to apprehend that an erroneous conclusion may be arrived at. In all codes, however, there must be some omissions which can only be supplied by analogy. From this defect the Hindu law cannot be expected to be altogether exempt. Where such cases occur, they doubtless furnish ample food for ingenuity; though in the course of my experience, I have met with but few instances of the kind, and still fewer in which there could be any legitimate or reasonable ground to doubt as to which side of the argument the preference should be assigned. I will illustrate my meaning by mentioning a case in point, in which, though there is more to be said on both sides than in most others of a similar nature, there can be but little doubt as to the doctrine which should be preferred. A man dies childless, leaving three widows him surviving. He gives permission to one of them to adopt a son after his death, which is done

accordingly. The adopted son dies, also childless, leaving the three widows aforesaid him surviving. Now the question is, to whom, on the death of such adopted son, will the property go? Should it be taken entirely by the widow who made the adoption, or should it be divided equally among the three widows? The law is silent as to this particular case; and those who contend that the property should be taken by the single widow, do so on the ground that although, had there been no adoption, the three widows would have been entitled to equal shares, and although, had the childless husband adopted the boy during his life-time, he could not have selected for him as adopting mother one of his three wives and excluded the others from all maternal relation, yet that a boy having been adopted after the death of the husband, the estate to which he succeeded belongs of right to the widow who received him in adoption, to the exclusion of the other two, who can be considered in the light of step-mothers only. This reason seems plausible enough, but it is not the law. The three widows of the same man are held to be, in a legal point of view, one and the same individual. The widow to whom the permission was given may indeed have the privilege of selecting the boy to be adopted; but the adoption being once made, he necessarily holds the same relation to all the three widows of his adopting father. I here merely allude to the rights and privileges accruing to the single widow from the simple fact of her having made the adoption, independently of any intention expressed or implied by the

deceased, that such widow alone should be considered as the mother of the adopted child. If he declared this explicitly, the case would be different ; or if such may be reasonably gathered to have been his intention, from some unequivocal indication of his will that his other wives should have no concern with the adoption. But the simple fact of his having commissioned any one of the three to select the boy, cannot be considered as sufficient to deprive the two others of their maternal rights, or to debar them from taking the shares to which they would have succeeded had no adoption taken place. Another case in point is that of a man dying survived by three widows, who take his property and divide it among themselves, each taking a third. On the death of one of them, who is entitled to succeed to her property, the other widows, or the heirs male of her husband ? The law is silent as to this point also. It is true that the law ordains the succession of the husband's heirs after the widow ; but this rule does not contemplate the existence of other widows, and the weight of it is counterbalanced by another, which prescribes that the widow shall take the entire property, to the exclusion of the heirs of the husband ; and, consequently, on the death of the first widow, the second and third take the share of which she died possessed, and, on the death of the second, the entire property will devolve on the third ; nor have the husband's heirs any legal claim until after her death. This proceeds upon the principle above-mentioned, that all the three widows of the same man are held to be, in a legal point

of view, one and the same individual. Cases of this description might here be infinitely multiplied, but the foregoing will suffice for the present.

The Hindu law of partition contains one anomaly, which would at first sight appear unjust and absurd. I allude to that rule which entitles an idle brother to claim a share of the acquisitions of his industrious brethren,—the drone to participate in the labours of the hive. But when the peculiar constitution of the Hindu society is considered, this provision will not be found to be altogether repugnant to justice or to reason. No respectable Hindu would travel in quest of employment without providing sufficient protection for the females of his family; and the individual usually selected for this purpose is one of the brethren, who resides without any active employment in the family house, while the rest go in quest of service, and not unfrequently amass immense wealth, while the brother left behind has not advanced one step from his original state of poverty. But it would be hard to deny him a share of the good fortune which had attended his brethren, since it is evident, that unless some one had performed the part he undertook, they could not have acquired the wealth; and he may, therefore, be fairly held to have contributed his aid towards the acquisition. It might also be affirmed, that had he engaged in a more active occupation, the same success would also have attended his endeavours. Where the patrimony has been used (however slight the use of it may have been) in making the acquisition, an idle brother, though

not engaged in domestic duties, is entitled to participate likewise; but even in this provision there is reason. It could not be affirmed with certainty, that the same sum extracted from the original stock might not have been turned to so good an account by him who had not, as by him who had expended it. The sum so expended was the root and origin of the subsequent acquisition; and, as to its amount, it would obviously be impracticable to define what should, and what should not be considered to constitute the use of the patrimony.

Questions connected with the connubial state are, as I before observed, but rarely brought into the courts of judicature under this presidency. I have, therefore, refrained from expatiating on the subject. It can but rarely, if at all, in any of its bearings, form a topic of legal controversy. To those who are desirous of more full and particular information relative to this branch of Hindu economy, the labours of Ward may safely be recommended, as combining minuteness with accuracy in an eminent degree.

The law regarding adoption is deserving of the most serious and attentive consideration, as there is perhaps no topic of Hindu jurisprudence more surrounded by doubts and difficulties. Some of these I have endeavoured to clear up and remove; and if I have betrayed too much confidence in the attempt, I can only plead in excuse, that to speak dubiously where I had brought my own mind to conviction, would have defeated the object I had in view. Reduction to certainty, or to a point as nearly approach-

ing to it as practicable in the absence of positive demonstration, was that object; but it will be for others to judge, having the evidence and the conclusion before them, whether the latter is consistent with the former. In all essential matters, it will be seen that the law of adoption among the Hindus assimilates closely to that which prevailed among the Athenians and the Romans. The points regarding which, in modern practice, the greatest disagreement has been evinced, are those relative to the proper age for adoption, the succession of the son adopted to the property of his adopting father's collateral relations, and the legality or otherwise of two successive adoptions.

In the case of minors, the Hindu legislature does not appear to have made any express provision against the rapacity of those interested in outliving them; but it was probably considered, that by constituting the sovereign power the legal guardian of all infants, and by declaring them exempt from liability of whatever description, *durante minoritate*, sufficient safeguards had been established; that by the first would have been secured wisdom and caution in the selection of an immediate protector for the person and property of the minor; and that by the second all pretence for the invasion of his interests would be removed.

I have not thought it requisite to discuss at much length the doctrine of slavery among the Hindus: but since hazarding a few observations on that topic, I have looked into Puffendorf's Disquisition on Des-

potical Power,* and find that he traces the origin of all servitude to contract. He observes, that "in the early ages of the world, when men began to quit their primitive plainness and simplicity, to cultivate the method of living, and to enlarge their fortunes and possessions, it is very likely the wiser and richer sort invited those of less parts and less wealth, to assist them in their business for hire. Afterwards, when both parties found their benefit in this way of proceeding, the meaner tribes were by degrees persuaded to join themselves perpetual members to the families of the greater," &c. He then proceeds to argue, that "the convenience of discharging inferior offices and labours by the hands of others being thus found out, in succeeding times, when wars grew pregnant in the world, it passed by degrees into a custom, to indulge captives with life and corporal liberty, upon condition that they should yield perpetual service to the conqueror. In this respect the learned jurist (as he himself admits) differs from many other high authorities; but it matters little whether slavery had its origin in war or in peace. We know, at all events, that in proportion to the progress of the arts of peace, the evils of war are mitigated, and that it is only among the most uncivilized nations of the present day that success in war is considered as a just reason for making slaves of the captives.

Contracts are not required by the Regulations to be interpreted conformably to the principles of Hin-

* Book vi., Ch. 3.

du law, though it must occasionally so happen that a reference to this branch of jurisprudence will be found necessary for the adjustment of a dispute connected with the law of inheritance. In the chapter on minority, allusion is made to a case illustrative of this fact. In the case adverted to, the mother of a minor had sold his paternal landed property, with a view to liquidate a debt which had been contracted by his father. On suit to set aside the sale, and to recover the estate in virtue of the right of inheritance, it became necessary to determine, in the first instance, how far the widow was competent to contract, under all the circumstances of the transaction; and the determination of this question obviously depended on the law by which the transferred estate was governed. The necessity of conforming to the Hindu law of contracts, had it been enjoined as the rule of decision in all their dealings, would not, perhaps, have furnished just cause of regret. The Supreme Court is required to administer justice to the Hindus in matters of contract agreeably to their laws and usages; and it has been remarked by one of the Judges of that Court,* who had devoted no small portion of his time to the study of their code, and who was not by any means disposed to view it generally in a favourable light, that "if a prevalence of common sense is to be discovered in the laws of the Hindus, it must be sought for in that portion of them, containing the precepts by which dealings between one man and another are to be regulated."

* The author of the Considerations on Hindu Law as current in Bengal.

Of the version from the *Mitácshará* containing the Hindu doctrine relative to judicial proceedings, it remains to speak. Detached portions of this translation have already appeared in the work entitled, "Considerations on Hindu Law," but I deemed it advisable to present the whole to the European reader in a connected form on this occasion. It will readily be perceived, that the forms of administering civil justice were primitive, and compendious enough. Perspicuity and precision are continually enjoined in the pleadings, and litigation appears to have been attended with no expense. We have no means of ascertaining whether the operation of the system was efficient, but it probably sufficed for a population to whom the distinctions and refinements of commerce were unknown, and who appear to have never advanced beyond a certain point of civilization. There must always be a close analogy between the state of a society and its laws. Where the one is neither artificial nor progressive, the other, as a natural consequence, will be simple and stationary. This is accordingly the case with the Hindus. For ages their national condition has undergone no change, and for ages their national code has continued undisturbed by reform or modification. The trial by ordeal, termed the *Divia Pruṇanum*, which may be translated *Judicium Dei*, forms a very prominent part of the system; but in this the Hindus are by no means peculiar, the purgation by ordeal seeming, as remarked by Blackstone, to have been very ancient and very universal in the times of superstitious barbarity.

Throughout the whole of the chapter on judicial proceedings, it would not be difficult to trace analogies between the Hindu, and more enlightened codes of jurisprudence; but I do not possess sufficient qualifications for the task, nor would the result be profitable, even were it well executed. I have, therefore, contented myself with noting such as obviously suggested themselves to me while engaged in the version of the original.

There may be said to exist in the present day five distinct schools of Hindu law, which differ more or less from each other. They may be termed the schools of Bengal, of Benares, of Mithilá, of the Dekhan, and of the Mahrattas. The original *Smritis* are of course common to all, but they each assign the preference to particular commentators and scholiasts. In Bengal, the works chiefly followed are the *Dáyabhága* of *Jimutavahana*, the *Dayatatwa* by *Raghunandana*, the *Vyavaharatatwa* by the same author, the *Subodhini*, a commentary on the *Dáyabhága* by *Sricrishna Tarcalancara*, the commentary on the same by *Acharjia Chudamani*, the *Dayacramasangraha* of *Sricrishna*, and the compilations termed the *Vyavastharnava*, the *Vivadarnavasetu*, and the *Vivadabhangarnava*. In Benares, the preference is shewn to the *Mitácshará* of *Vijnyaneswara*, and its commentary by *Veereshwara Bhatta* and *Balambhatta*; the *Veeramitrodaya* by *Mitramisra*; the *Parasuramadhava*, and the *Vyavaharamadhava*. In Mithilá, respect is paid chiefly to the following authorities:—the *Vivadachintamani* and *Vyavaharachintamani* by *Vachaspatimisra*, the *Vivada-*

ratnacara by *Chandeswara*, the *Madanaparijata* by *Madanopadhyaya*, the *Dwaitaparisishta* by *Keshaba Misra*, the *Smritisara* and *Smritisamoochaya* by *Hurinathopadhyaya*, and the *Vivadachandra* by *Misroo Misra*. The *Mitácshará*, the *Smritichandrica*, the *Madhaveeya*, and the *Suraswativilasa* are the works of paramount authority in the territories dependent on the government of Madras ;* while the authorities chiefly referred to on the Bombay side are, (besides the text books of *Menu* and *Yajnyawalcya*,) the *Vyavaharamayuc'ha*, the *Nirnayasindhoo*, the *Hemadree*, the *Vyavaharakoustoobha*, and the *Parasuramadhava*.† I do not mean to affirm that these are the only works of paramount importance recognized in the respective schools; but they are most frequently referred to ; they are sufficient to solve the ordinary legal questions which arise ; and suspicion may justly be excited, where an exposition of law is supported by citations from more recondite authorities. In questions relative to the law of adoption, the *Dattacamimansa* and *Dattacachandrica* are equally respected all over India ; and where they differ, the doctrine of the latter is adhered to in Bengal and by the southern jurists, while the former is held to be the infallible guide in the provinces of Mithilá and Benares.

The Precedents contained in the second volume have been selected from an enormous mass of crude materials. When it is mentioned, that I have ex-

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* See preface to Elem. Hin. Law, p. 14.

† See preface to Summary of Hindu Law, p. 5.

amined every opinion that has been delivered in every court of judicature subordinate to the presidency of Bengal from the year 1811 up to the present day, it may be a matter of wonder, that the selections are not more numerous and more valuable. But the task of rejection has been found very laborious; at least nine-tenths of the opinions were ascertained, on examination, to be erroneous, doubtful, unsupported by proof, or otherwise unfit for publication; while, in not a few instances, the nature of the case itself was involved in obscurity, from the circumstance of the reply alone being forthcoming; the whole record of the case having been made over to the law officer, with a view to enable him to find out, and report the law upon, the point or points at issue between the parties. The admitted opinions have been carefully examined; and they will, it is hoped, be in general found to have at least the merit of accuracy.

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PRELIMINARY REMARKS
ON
MAHOMEDAN LAW.

THE want of some practical information on the subject of Mahomedan Law has long been felt and acknowledged by those whose duty it is to decide matters of civil controversy agreeably to its principles. The translation of the *Hidaya*, indeed, is calculated to extend a general knowledge of that Code, but it is of little utility as a work of reference, to indicate the Law on any particular point which may be submitted to judicial decision. Questions which are likely to be litigated give place to extravagant hypotheses, the occurrence of real cases, similar to which, is beyond the verge of probability. The arrangement is immethodical; the most prolix and irrelevant discussions are introduced; every argument, however absurd, both for and against each particular tenet, is urged and combated (often with doubtful success); and the reader is frequently at a loss to determine which opinion to adopt and which to reject.

"No branch of Jurisprudence is more important than the Law of Successions or Inheritance; as it

constitutes that part of any national system of laws which is the most peculiar and distinct, and which is of most frequent use and extensive application."*

The subject unquestionably is of the greatest importance, as affecting the interests of all descriptions of people; but the *Hidaya* is entirely silent on the subject. It deserves special notice as giving rise to interminable litigation; a result attributable, more probably, to the almost universal ignorance of the people who are affected by it, than to any intricacy or obscurity of the Law itself. No English writer, that I am aware of, has treated of the Mahomedan Law of Inheritance excepting Sir William Jones, who translated the *Sirajyah*, a celebrated work on that subject; but, being a version of a scientific Arabic treatise, the style of his work is necessarily abstruse, so much so, that a knowledge of the original language is almost requisite to the study of the translation. In his abstract translation of its commentary (the *Shureefeea*) he has introduced such illustrations only as appeared to him (who was thoroughly acquainted with the text) necessary to facilitate the understanding of it. For these considerations I was induced to undertake the work which is now with diffidence submitted to the Public. Conscious of my inability to do justice to the task, I may yet venture to express a hope, that my labours may prove of some assistance to my judicial brethren, or

* Colebrooke's Preface to the two Treatises on the Hindu Law of Inheritance.

that, at least, an abler individual may follow up with success the work which I have so imperfectly commenced. I am aware that, among other faults, I may be charged with being obscure, where I laboured at brevity, and with being tiresome, where my object was illustration. I can only say, that I have endeavoured, as much as was in my power, to avoid technicalities, and to treat the subject with all the perspicuity of which it is susceptible. I have spared myself no pains in my researches to establish the accuracy of the legal doctrines here laid down, and to those who are disposed to view with approbation any attempt, however humble, at the promotion of justice, it may perhaps seem reasonable, that the disadvantages of the author should be weighed against his imperfections. Continual want of leisure and occasional privation of health have attended me during the progress of this work. I should mention, that the compilation is (excepting the assistance derived from learned natives) entirely and exclusively my own, and that it consequently possesses no official weight whatever, and no authority, beyond that which may be ascribed to it by individual confidence. The brief disquisition on the Mahomedan Law, which I have here ventured to introduce, may not be matter of much utility; but I was amused by the analogy occasionally observable between this and other Codes of Jurisprudence, and it appeared to me, that by recording such observations as my limited knowledge suggested, I might be the means of attracting the attention of others to the genius of the Law in question.

The provisions of the Mahomedan Law of Inheritance have for their basis the following passages of the Koran ; " God hath thus commanded you concerning your children. A male shall have as much as the share of two females ; but if they be females only, and above two in number, they shall have two-third parts of what the deceased shall leave ; and if there be but one, she shall have the half : and the parents of the deceased shall have each of them a sixth part of what he shall leave if he have a child ; but if he have no child, and his parents be his heirs, then his mother shall have the third part : and if he have brethren, his mother shall have a sixth part, after the legacies which he shall bequeath and his debts be paid. *Ye know not whether your parents or your children be of greater use unto you.* This is an ordinance from God, and God is knowing and wise. Moreover ye may claim half of what your wives shall leave, if they have no issue ; but if they have issue, then ye shall have the fourth part of what they shall leave, after the legacies which they shall bequeath and the debts be paid : they also shall have the fourth part of what ye shall leave in case ye have no issue ; but if ye have issue, then they shall have the eighth part of what ye shall leave, after the legacies which ye shall bequeath and your debts be paid : and if a man or woman's substance be inherited by a distant relation, and he or she have a brother or sister, each of them two shall have a sixth part of the estate, but if there be more than this number, they shall be equal sharers in the third part,

after payment of the legacies which shall be bequeathed and the debts, without prejudice to the heirs."* "They will consult thee for thy decision in certain cases : say unto them, God giveth you these determinations concerning the more remote degrees of kindred. If a man die without issue, and have a sister, she shall have the half of what he shall leave ; and he shall be heir to her, in case she have no issue, but if there be two sisters, they shall have, between them, two-third parts of what he shall leave : and if there be several, both brothers and sisters, a male shall have as much as the portion of two females."† In these provisions we find ample attention paid to the interests of all those whom nature places in the first rank of our affections ; and indeed it is difficult to conceive any system containing rules more strictly just and equitable. The obvious principle of preferring the nearer kindred to claimants whose relation to the deceased is not so proximate, seems to have been adopted as the invariable standard for fixing the proportions ; and the rules for the succession of the several heirs, and the order of preference assigned to the different degrees of consanguinity, seem to be exactly what would be most consonant to the general inclination of mankind. The Mosaic Law on the subject of Inheritance is more brief and less comprehensive : "And thou shalt speak unto the children of Israel, saying, if a man die, and have no son, then ye shall cause his inheritance to pass unto his daughter ;

* Sale's Koran, pages 94 and 95, vol. i.

† Sale's Koran, page 127.

and if he have no daughter, then ye shall give his inheritance unto his brethren. And if he have no brethren, then ye shall give his inheritance unto his father's brethren: and if his father have no brethren, then shall ye give his inheritance unto his kinsman that is next to him of his family, and he shall possess it."* Here we find no provision whatever made for the parents, although there are certainly other obvious reasons besides that adduced in the emphatic language of the Koran, why they should not be excluded. "Upon failure of issue in the first and the other descending degrees, reason suggested that inheritance ought to turn back into the line of ascendants; as well in consideration that for the most part, either the possessions themselves, or at least the first seeds and principles of them, which the children afterwards increased, proceed from the parents, as because their extraordinary benefits give them an especial title to this reward: who, since they would much rather have desired, *that their children should inherit their fortunes*, yet when they survived them, contrary to the course of nature, it was but equitable they should receive (however melancholy) this comfort of succeeding to what the children possessed. *It is a condition* (as Pliny observes) *abundantly unhappy for a father to be sole heir of his own son.*"† Accordingly we find

* Numbers, Chap. 27.

† Puffendorf on the Law of Nature and Nations, Book IV., Chap. IX. § 13, and see continuation of the argument. The same learned author cites the following argument, as having been adduced to prove that the rights of the parents were not overlooked by the Jewish Law; but he does not seem to attach much weight thereto, and it is sufficient, for my

that the Civil Law expressly enumerates the parents among heirs.

In the English Law of successions to the personal property of intestates, I am aware that ample consideration is shown to the parents; but they are excluded from inheriting real property.

The Hindu Law makes provision for the parents, but its rules differ generally from those of the Mahomedan Code, inasmuch as, agreeably to the former, several descriptions of heirs, varying in degree of relation, inherit successively, but not simultaneously. According to the Hindu Law, where there are sons or other lineal male descendants, they alone are the legal heirs. I make no mention of the provision assigned to the mothers and to the daughters; that to the former persons being assigned, only in the case of partition by sons, and that to the latter persons

purpose, that the Law in question contains no express provision for the parents. In truth, the argument advanced seems rather jesuitical: "Philo the Jew reporting that Moses established this order of inheritance, that the sons should stand first, the daughters next, then the brothers, and in the fourth place the uncles by the father's side, used this as an argument to prove that fathers likewise may inherit what their sons leave behind; for it would be useless (says he) to imagine that the uncle should be allowed to succeed his brother's son, as a near kinsman to the father, and yet the father himself be abridged of that privilege; but inasmuch as the law of nature appoints that children should be heirs to their parents, and not parents to their children, Moses passed this case over in silence, as ominous and unlucky, and contrary to all pious wishes and desires; lest the father and mother should seem to be gainers by the immature death of their children, who ought to be afflicted with most inexpressible grief. Yet by allowing the right of inheritance to the uncles, he obliquely admits the claim of the parents, both for the preservation of decency and order, and for continuing the estate in the same family."

being accorded rather with a view to their maintenance than admitted as an absolute and indefeasible right of inheritance. According to the Mahomedan Law, on the other hand, the claim of the daughters to a share equal to half of what is taken by the sons is recognized as being on the same footing as the claim of the sons; and so also the claim of the father and mother, and husband and wife, to their specific allotments. The parents are entitled to the inheritance, by the Hindu Law, only in default of male or female issue of the widow, and, conformably to some authorities, of the brothers also.*

The apparently unjust preference of the elder son, to the exclusion of all the rest, which in our own Law had its origin in the feudal policy of the times, is rejected by the Mahomedan Law, and the equitable principle of equality obtains in its stead. The learned author of the Commentaries on the Law of England informs us, that "the Greeks, the Romans, the Britons, the Saxons, and even originally the Feudists, divided the lands equally." † He admits that this is certainly the most obvious and natural way, and quaintly observes, that "it has the appearance, at least in the opinion of younger brothers, of the greatest impartiality and justice."‡ That

* In this respect the Civil Law seems to partake of the principles both of the Hindu and Mahomedan Codes. It resembles the former in giving exclusive preference to the children, and it resembles the latter in permitting simultaneous succession of brethren and parents.

† Blackst. Comm., vol. ii., page 214.

‡ Ibid.

there are reasons of expediency which suggest this preference there can be no doubt; but how far it may be consistent with justice may perhaps be questionable. It is by this principle of equality also that the Hindu Law of Successions is governed.*

The only rule which bears on the face of it any appearance of hardship, is that by which the right of representation is taken away, and which declares that a son, whose father is dead, shall not inherit the estate of his grandfather together with his uncles. It certainly seems to be a harsh rule, and is at variance with the English, the Roman, and the Hindu Laws.† The Mahomedan doctors assign as a reason for denying the right of representation, that a person has not even an inchoate right to the property of his ancestor, until the death of such ancestor, that, consequently, there can be no claim through a deceased person, in whom no right could by possibility have been vested.

I have met with a passage in a learned author already quoted, which seems so apposite to the present subject, that I may be pardoned for transcribing it here: "On the proposition which we before advanc-

* Conformably to the ancient Hindu Law, the right of primogeniture was partially recognized, "let the eldest have a double share, and the next born a share and a half, if they clearly surpass the rest in virtue and learning." Menu, chap. ix., § 117, but the distinction in favour of primogeniture is abolished in the present age.

† According to the Scottish Law, I find that although the right of representation is acknowledged as to real property, yet that it does not obtain in the succession of moveables, except in the single case of a competition between the full blood and half blood.—Erskine's Principles, page 414.

ed, *That parents are obliged to afford sustenance to their children, not only of the first, but of farther degrees, in case their proper parents, who ought to perform this office, are extinct*, is chiefly founded the *equity* of that *right* termed *the right of representation;* by virtue of which, children are supposed to fill the place of their deceased father, so as to be allowed the same share in the family inheritance as their father, where he now living, would receive; and, consequently, to succeed on the level with those who stand in their father's degree. And it would indeed be a lamentable misfortune, if, besides the untimely loss of their father, they would farther be deprived of those *possessions* which either the rule of the Law, or the design of their *progenitors*, had given their *parents* just hopes of enjoying. But if in any place the *civil constitutions* will not admit of this *representative right*, the children, who have been so unhappily bereaved of their father and of their hopes, must endeavour to bear the calamity as an affliction which Providence hath laid upon them."*

The rules of inheritance prescribed by this Code differ from those of any other with which I am acquainted. It would be a useless task to point out its peculiarities, as they are obvious. Perhaps the system to which it bears the nearest resemblance, is that of our own Law in distributing the personal property of an intestate, according to which, "when relations are found who are distant from the intestate by

* Puffendorf on the Law of Nature and Nations.—Book IV., Ch. xi., §§ 12.

an equal number of degrees they will share the personal property equally, although they are relations to the intestate of very different denominations, and perhaps not relations to each other. As if the next of kin of the intestate are great uncles or aunts, first cousins, and great nephews or nieces, these being all related to the intestate in the fourth degree, will all be admitted to an equal distributive share of his personal property."* But to this system even the resemblance must be admitted to be very faint.†

The Mahomedan lawyers have divided heirs‡ into three different classes, first, legal sharers; second-

* Blackst. Comm., vol. ii., page 515, Note.

† There is a remarkable degree of similarity between the provisions of the English Law relative to the mode of disposing of an intestate's personal estate and the rules of the Mahomedan Law for administering to the property of a person deceased. In the Commentaries, treating of the duty of an executor or administrator, it is enjoined, "He must bury the deceased in a manner suitable to the estate which he leaves behind him, necessary funeral expences are allowed previous to all other debts and charges." The *Sirajyah*, treating of the successive duties to be performed with regard to the property of a person deceased, commences, "first his funeral ceremony and burial without superfluity of expence, yet without deficiency." The Commentaries, "the executor or administrator must pay the debts of the deceased." The *Sirajyah*, "then the discharge of his just debts from the whole of his remaining effects." Again, the Commentaries, "when the debts are discharged, the legacies claim the next regard." And the *Sirajyah*, "then the payment of his legacies out of a third of what remains." Lastly, the Commentaries, "when all the debts and particular legacies are discharged, the surplus or residuum must be paid (where it is not left to the executor) to the next of kin: and the *Sirajyah*, "and lastly, the distribution of the residue among his successors."

‡ Throughout this work I use the term "*Heir*" in its broadest sense, to signify any person who has a right of inheriting any species of property.

ly, residuaries, and those are either by relation or by special cause; and thirdly, distant kindred. The legal sharers are the husband and wife, the father and mother, the grandfather and grandmother, the brother by the same mother, the sister by the same mother, the uterine sister, the sister by the same father, the daughter, and the son's daughter. The residuaries by relation are the sons and their descendants, the father and his descendants, the paternal grandfather in any stage of ascent and his descendants, and in some cases sisters and daughters. Those by special cause are the manumittors of slaves and their heirs. The distant kindred comprise all those relations who are neither legal sharers nor residuaries; and, in their default, the property goes to the successor by contract, and to persons of acknowledged, though not proved, consanguinity. It will be seen, on reference to the principles of inheritance, that many of the persons above enumerated have the privilege of simultaneous succession, whether the property be real or personal; which circumstance is the chief peculiarity of the Mahomedan Code.

The rules agreeably to which distributions are made would, at first sight, appear rather complex and intricate; but they may be speedily acquired by a very moderate share of attention, and, when once known, there can arise no legal problem, relative to successions, which would not, by their means, admit of easy and satisfactory solution. It must, at the same time, be admitted, that the heterodox Code, or that which is observed by the *Schias* (commonly called the

Imameeya sect, as they follow the doctrines of the twelve *Imams*) can boast of much greater simplicity. This Code has hitherto had no weight in India, and even at *Lucknow*, the seat of heterodox majesty itself, the tenets of the *Soonees* are adhered to. I have however given a compendium of their law of inheritance, extracted from the "*Shuraya ool Islam*," a work of the highest authority among them. This I was induced to do, as no account has ever been rendered, to my knowledge, of the doctrine of the sect in question, on the law of inheritance ; and as I have reason to believe that our courts of justice have passed decisions avowedly in conformity to its principles. Considering the universal toleration that prevails throughout the British dominions in India, it is perhaps but equitable, that the Law should be administered to the sectaries in question, agreeably to their own notions of jurisprudence, especially in matters affecting the succession to property, in which cases both parties are of course always of the same persuasion.

Where the Law expressly prohibits the receipt of interest on money, and all usurious contracts, it is natural to find the provisions regarding purchase, sale, and similar transactions, extremely simple and certain in their nature. Such is accordingly the case in the Mahomedan Law. There is no distinction made between sale and permutation ; a barter of one commodity for another being designated a sale. Even according to our own Law, the distinction is merely nominal, and there is no difference as to the legal

provisions relative to sales and exchanges. The principal points of difference seem to be, the absence of any discrimination in the Mahomedan Law of sales of real and personal property, and its recognizing verbal contracts as of equal validity with written ones. Another essential point of difference is, that the maxim of *caveat emptor* finds no place in this code.

The most efficient safeguards against the effects of improvidence in purchasers are established, so much so, as almost to exclude the possibility of circumvention. A warranty is implied in every sale and a reasonable period of option may be stipulated, during which it is lawful to annul the contract. Where property has been purchased unseen it may be returned, if it does not fully answer the description, and the seller may at any time be compelled to receive back the property and refund the purchase money, on the discovery of a blemish or defect, the existence of which, when in the possession of the seller, may be susceptible of proof.

In exchange, where the articles opposed to each other are of the nature of similars, equality in point of quantity is an essential condition to the validity of the contract, and no term of credit, on either side, is admissible, which would be advantageous to one of the parties, and savour therefore of usuary; but where goods are sold for money, or money is advanced for goods, a term may be stipulated for the payment of the money, or for the delivery of the goods. So tenacious however is the Law, of certainty, that

it will not admit of any, the least, indefiniteness in the term. The date must be specified. From the above observations it will be seen, that the Mahomedan Law of sales does not differ very materially from the Civil Law, to which the provisions of the Scottish code bear a close resemblance.*

Sales of land and other immoveable property are clogged with an incumbrance, which is not, however, peculiar to this code. I allude to the Law of pre-emption. This confers the privilege on a partner or neighbour to preclude any stranger from coming in as a purchaser, provided the same price be offered as that which the vendor has declared himself willing to receive for the property to be disposed of.

In the Jewish Law † allusion is made to the custom, but it is not to be found among the ordinances of the Koran. On the authority of *Puffendorf* it would appear that the right in question was not unknown to the ancients. He states "another more easy sort of redemption, is what they call *Jus protimêso*,

* The vendor, where he is not the true owner, cannot, by delivery, transfer to the purchaser the property which was not his to give; but the purchaser, in respect of his *bonâ fide*, makes the fruits of the subject his own, till it be evicted, or at least reclaimed, by the true owner, 2. 1. 14. And, as warrandice is implied in all sales, the vendor must make the subject good, if it be evicted, 2. 3. 11. The insufficiency of the goods sold, if it be such as would have hindered the purchaser from buying had he known it, and if he quarrels it recently, founds him in an action, (*Actio redhibitoria*) for annulling the contract. If the defect was not essential, he was, by the Roman Law, entitled to a proportional abatement of the price, by the action *quanti minoris*.—Erskine's Principles, page 310.

† Leviticus, Chap. xxv.

or the privilege of the first refusal, that is, if the buyer be hereafter disposed to part with the commodity, he must let the seller have the first refusal at the same rate he would sell it to another. In many cases, certain persons pretend to this privilege by Law, as the landlord in the sale of his tenant's stock, the creditor in his debtor's goods, the neighbour in the purchase of a neighbouring farm, any members in a thing that belongs to the society, and the next of kin in the goods of their relations, which is peculiarly called *retractus gentilitius*, or the family privilege."* For a long time, I was of opinion that the Municipal Law of the Hindus had no provision to justify the claim of such a privilege; and, indeed, the more current authorities are entirely silent on the subject. Hindu litigants, of course, have endeavoured to assume it whenever self-interest dictated; but I was not, until lately, aware that any authority could be cited in its support. By the Mahomedan Law, unquestionably, Hindus have the same title to claim the privilege as Moosulmauns; but, assuming it to form no part of their own Law, I apprehend they ought not to be permitted to take advantage of the doctrine in question. The principles of the Hindu and Moosulmaun Codes are declared applicable to cases of inheritance, contract, &c. arising among these two great bodies of the community; but, at the same time, applicable respectively only. It is declared, also, that where the parties are of different persuasions, the Law of the defendant shall be

* Book V., Chap. v., §§ 4.

adhered to, but by this provision, it was never intended that a plaintiff might make his election between the two Codes, and prefer a claim to be decided by that Law which best suited his particular purpose.—While officiating, as judge of the *Zillah Court* of *Shahabad* I made a reference to the *Sudder Dewanny Adawlut* on a point connected with this question, to the following effect: "does the Mahomedan Law of *Shoofaa*, or right of pre-emption extend to Hindus? or in other words, would the Court be justified in entertaining and investigating a claim preferred by one Hindu against another, and resting solely and avowedly on the principle of Law abovementioned? I am supposing the defendant either to have demurred on the plea of the inapplicability of the Law quoted to his case, or from ignorance, or from thinking that he had other substantial grounds of defence, or from any other cause, to have neglected making the objection; but at the same time not to have expressly admitted his willingness to leave the point at issue to be tried according to the provisions of that Law. I can find only one case (the first) among the printed reports at all bearing on the point: there is a remark subjoined which seems by no means satisfactory or conclusive: the case is clearly not included in the Letter of Section XV., Regulation VI., 1793, nor in any subsequent enactment; but I observe in Mr. Harington's Analysis, that on a reference to the *Sudder Dewanny Adawlut* in the year 1798, the Court were of opinion that the spirit of the rule for observing the Hindu and Mahomedan Laws was

applicable to cases of slavery, though not included in the letter of it. The same principle of construction might I think be extended to this case : I conceive that a Mahomedan, with as much reason, might sue his brother for the *Jethansha*,* or larger share in right of primogeniture, according to the Hindu Law. In the *Hidaya* the right of *Shoofaa* is declared to be but a feeble right, as it is the disseizing another of his property, merely in order to prevent apprehended inconvenience : its extension to all cases of neighbourhood cannot fail to depreciate the value of landed property; and being impressed with a conviction of the unreasonableness of the Law in question, according to modern construction, I should feel very much inclined to circumscribe its operation within as narrow bounds as possible. The suits which occasioned the present reference are seven in number. The parties, at least the *Shafee* or claimant of the right, and the seller or defendant, are the same individuals in all the seven suits. These two persons purchased at public auction, four or five years ago, several very valuable estates, totally distinct from each other, with separated and defined boundaries. One of them having lately disposed of some of his *Mouzas*, by private sale, the other (who resides at Benares) sues him and the purchasers jointly, on his alleged right of pre-emption ; the property of the claimant bordering

* This right is obsolete in the *Cali* or present age among the Hindus, but as it still retains a place in their law books, and is a characteristic feature of their Code, it served for the purpose of illustration on this occasion.

on that sold. In four of the cases the defendant pleaded his own cause, and no demurrer was made on the plea of the inapplicability of the Law to the parties. In the other three, vakeels were entertained, and the objection was made. Under such circumstances, it can hardly be contended, that the omission in the pleadings implied that the defendant considered himself amenable to the Law in question; and I felt disposed, therefore, to non-suit the plaintiff. I should have done so, had I not reason to believe that cases have been tried and decided on the merits under similar circumstances, and that an express authoritative opinion on the subject would effectually remove all doubt, and, by preventing one cause of unreasonable litigation, prove essentially beneficial to the community at large." To the above reference I was informed, in reply, that no rule of Mahomedan Law could apply to a civil suit in which the parties are Hindus, as they would appear to be in the cases to which my query related; that the Court did not hold the 15th Section of Regulation IV., 1793, to preclude me from ascertaining from my Hindu law officer whether the right of pre-emption was recognized by the Hindu Law, and if so, what the provisions of the Law respecting it were; and that, at the same time, it was obvious, that it was not one of those cases in which the Regulations necessitate the Judge to follow the Law as expounded by his Law Officer, should it appear to be irreconcileable with well established local usage, or to be otherwise mischievous or manifestly inconvenient." Since, how-

ever, I had occasion to make this reference, I have found in the *Muha Nirbana Tuntra*, a work which chiefly treats of mythology, a passage which would seem to imply that pre-emption is recognized as a legal provision according to the notions of the Hindus. For the gratification of the curious I subjoin in a note* the passage, with a translation. But it re-

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* स्थावरंधनमन्यस्मै स्थितेसान्निध्यवर्त्तिनि योग्येक्रेतरिविक्रेतुं नशक्तःस्थावराधिपः ।१। सान्निध्यवर्त्तिनांज्ञाति : सवर्णोवाविशिष्यते तयोरभावेसुहृदो विक्रेतुश्चागरीयसी । २ । निर्णीतमूल्येप्यन्येन स्थावरस्यक्रयोधमे तन्मूल्यंचेत्समीपस्थो रातिक्रेतानचापरः । ३ । मूल्यंदातुमशक्तश्चेत्सम्मतोविक्रयेपिवा सन्निधिस्थस्तदान्यस्मै गृहीयात्क्रीतिविक्रये । ४ । क्रीतंचेत्स्थावरंदेवि परोक्षेप्रतिवासिनःश्रवणादेवतन्मूल्यं दत्वासौग्राहमुमर्हति। ५ । क्रेतासचगृहारामान् विनिर्माययुनक्तिवा मूल्यंदत्वपिनाप्नोति स्थावरंसन्निधिस्थितः । ६ । कारणीनाप्रतिहता वन्यावन्यातिदुर्गमा अनादिष्टोपितांभूमिं संपन्नांकर्तुमर्हति ।७। बहुप्रयाससाध्याया कस्याभूमिर्गृहीयते दत्वादशांशांभुंजीयात् भूमिस्वामीयतोनृपः।८। वापीकूपतडागानां खननंहरीपणम् परानिष्टकरेदेशेनगृहंकर्तुमर्हति । ९ ।

The proprietor of immoveable property, having a neighbour competent to purchase it, is not at liberty to sell such property to another. Among neighbours, he who is a relation, or of the same tribe, is preferred. In their default a friend. [Here] the will of the seller prevails; even though the price of the immoveable property be agreed upon with another, yet if a neighbour [pay] the price, he is the purchaser, and not another. If the neighbour be unable to pay the price, or be consenting to the sale, the proprietor is then at liberty to sell it to another. O goddess! if immoveable property be sold in the absence of the neighbour, and he (the neighbour) pay the price immediately on hearing of the sale, he is competent to take it. But should the purchaser, having made houses or gardens, be in the enjoyment of them, the neighbour is not entitled to take such immoveable property even by paying the price. A person is at liberty, without permission, to cultivate lands which pay no revenue, or have been usurped, or waste, or, though not waste, are extremely difficult of access. He may enjoy the rest, having given to the king the tenth [of the produce] of the lands thus with difficulty acquired; the king being lord of the soil. A proprietor is not at liberty to dig ponds, wells, or pools, in a place where it would be annoying to others.

mains yet to be decided whether this shall be held to be practical Law or no.* The Pundit with whom I perused the passage in question, declared that the right of pre-emption takes effect only in cases where positive injury would result to the neighbour by the sale to a stranger; and, from the tenor of the last sentence, such would, indeed, seem to be the effect against which the provision was intended to guard.

It is true that there are numerous devices by which a claim, founded on the right of pre-emption, may be avoided, and that the Law itself, admitting its weakness, has annexed hard conditions to the establishment of its validity. But these are not sufficient bars to litigation in India, when opposed to the natural propensities of the natives, and the trifling expence at which they may purchase the gratification of inflicting legal annoyance.

The Law is extremely favourable to the donor where property is gratuitously conveyed. A gift should always be accompanied by delivery of possession. False pretences, legal incapacity, or other similar circumstances, under which the validity of a gift may be questioned, and which would render it either void *ab initio*, or voidable, need not be specified: they are the same as those which obtain in most other codes of jurisprudence, and they would no doubt

* The interminable and troubled ocean of Hindù jurisprudence is sure to present something for the support of any opinion which it may be desirous to keep afloat, for the purpose of temporary convenience; and where the expounders of this Code restricted in their citations to a few works of notorious authority, it might have a salutary effect in curbing their fancy, if not their cupidity.

avail in case of a suit brought by any representative of the donor to set aside a gift unduly made. But as to the donor himself, he has power to damand restoration, even where the gift may not have been attended by any disqualifying circumstances. This power, however, of revoking gifts, is subject to certain limitations. According to the English Law, a gift is revocable only under circumstances which would equally have operated to avoid any species of contract.* According to the Civil Law there were three causes only which could justify the revocation of a gift.† But, according to the Mahomedan Law, there are only seven circumstances under which a gift is not revocable.‡ A gift made on a death-bed, though not made in contemplation of death, is nevertheless not considered as a gift *inter vivos*, but has the effect of a legacy only, and consequently cannot extend to more than a third of the donor's estate. On comparing the chapter containing the principles of gifts (pages 56 to 58 of this work) with the contents of the subjoined note § taken from an authori-

* Blackst. Comm., vol. ii., page 441.

† Browne's Civil Law, vol. i., page 229.

‡ See Prin. of Gifts, page 57, §§ 13, and Prec. of Gifts, page 224.

§ All donations, whether by the wife to the husband, or by the husband to the wife, are both by the Roman Law and ours, revocable by the donor: *ne conjuges mutuo amore se spolient*, 1. 1, *de done. int. vir & ux.*; but if the donor dies without revocation, the right becomes absolute. A right may be revoked, not only by an explicit revocation, but tacitly, by afterwards conveying to another the subject of the donation, or by charging it with a burthen in favour of a third party; but in so far as the subject is not burthened, the donation subsists. Though the deed should be granted nominally, or in trust, to a third party, it is subject

ty already cited, but little difference will be found to exist. It should here, however, be mentioned, that though gifts to relations are generally irrevocable, yet a gift from a father to his minor son is revocable at the pleasure of the former. The right of a husband to revoke a gift to his wife, and *vice versâ*, does not appear to be recognized, as it is in the Roman and Scottish Laws.

The disposition of a testator being legally restricted to one-third of his estate, but little uncertainty can exist on the doctrine of wills and testaments. If the legacies exceed the amount above specified, the will is considered inofficious, and its provisions will be carried into effect *pro tanto* only. The law of Scotland also restricts a person, who leaves a widow and children, from disposing of more than a third part of his moveable property by will.* Nuncupative and

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to revocation, if its genuine effect be to convey a gratuitous right from one of the spouses to the other; *plus enim valet quod agitur, quam quod simulate concipitur.*—Where the donation is not pure, it is not subject to revocation: Thus, a grant made by the husband, in consequence of the natural obligation that lies upon him to provide for his wife, is not revocable, unless in so far as it exceeds the measure of a rational settlement. Neither are remuneratory grants revocable, where mutual grants are made in consideration of each other, except where an onerous cause is simulated, and a donation truly intended.—Erskine's Principles, page 77.

* If a person deceased leaves a widow, but no child, his testament, or, in other words, the goods in communion, divide in two; one-half goes to the widow, the other is the dead's part, *i. e.*, the absolute property of the deceased, on which he can test, and which falls to his next of kin, if he dies intestate. Where he leaves children, one or more, but no widow, the children get one-half as their legitim; the other half is the dead's part, which falls also to the children, if the

written wills are of equal validity, and the same degree of evidence is required to prove them as is necessary to the establishment of any other ordinary transaction between man and man.

The latitude granted by the permission of polygamy, and the apparent facility of divorce, are not, it must be admitted, accordant with the strict principles of impartial justice; but the evil, I believe, exists chiefly in theory, and but little inconvenience is found to follow it in practice. It is remarkable with what tenderness the rules relative to marriage and parentage are framed. Mr. Evans, in his Appendix to Pothier, treating of hearsay evidence, observes, "there is a disinclination to bastardize issue, which is sometimes perhaps carried too far. When parties are actually married, and there is no impossibility of the husband being the father of the issue of the wife, every consideration of decency and propriety repels the admission of evidence to the contrary; but when the question is, whether a person was or was not born during wedlock, it should be recollected that the interests of justice are concerned in preventing one, who is really a bastard, from usurping the rights of the legitimate members of the family; and there is no particular reason of public policy which requires that those who have the real rights in their favour should meet with peculiar obstacles in *substantiating*

father has not tested upon it. If he leaves both widow and children, the division is tripartite; the wife takes one-third by herself; another falls, as legitim to the children, equally among them, or even to an only child, though he should succeed to the heritage; the remaining third is the dead's part.—Erskine's Principles, page 418.

the proof of usurpation."* But the Mahomedan lawyers carry this disinclination much farther: they consider it a legitimate course of reasoning, to infer the existence of marriage from the proof of cohabitation.

None but children who are in the strictest sense of the word *spurious* are considered incapable of inheriting the estate of their putative fathers. The evidence of persons who would, in other cases, be considered incompetent witnesses is admitted to prove wedlock, and, in short, where, by any possibility, a marriage may be presumed, the Law will rather do so than bastardize the issue; and, whether a marriage be simply voidable or void *ab initio*, the offspring of it will be deemed legitimate. Much misconception exists, I imagine, however, relative to the Mahomedan Law on the subject of legitimate and illegitimate issue, and it seems generally supposed that, agreeably to its provisions, no person can be considered a bastard. The learned Sale observes, that "among the Mahomedans the children of their concubines or slaves are esteemed as generally legitimate with those of their legal and ingenuous wives, none being accounted bastards except such only as are born of *common* women, and whose fathers are unknown." This, I apprehend, with all due deference, is carrying the doctrine to an extent unwarranted by Law; for where children are not born of women proved to be married to their fathers, or of females, slaves to their fathers, some kind of evidence (however slight) is requisite

* Vol. II., page 291.

to form a presumption of matrimony. The mere fact of casual concubinage is not sufficient to establish legitimacy, and if there be proved to have existed any insurmountable obstacle to the marriage of their putative father with their mother, the children (though not born of *common* women) will be considered bastards to all intents and purposes. Another learned author also, citing the law of Solon, that a bastard shall not be deemed next of kin, nor any relation be supposed between him and the proper sons, proceeds to state, "on the contrary, amongst the Mahometans, as to the point of sharing the father's estate, there is no difference observed between the sons of the wife, the concubine, or the servant maid;" whereas, in point of fact, the marriage of a free woman, proved or presumed, is the only ground for considering her issue legitimate.* It must be admitted, at the same time, that there is no more difficulty in establishing a marriage by the Mahomedan than by the Scottish Law, according to which, though no formal consent should appear, marriage is presumed from the cohabitation, or living together at bed and board of a man and woman who are generally reputed husband and wife.† Marriage also, according to this Code, is entirely a civil contract. In answer to the question as to whether it was necessary for a marriage to be celebrated by a *Kazee*, the law officers attached to the Provincial Court of Bareilly delivered an opinion, on the 19th of April 1823, suggesting the expediency of

* Puffendorf, Book IV., Chap. xi., §§ 9.

† Erskine's Principles, p. 67.

the observance of this form, rather than its necessity. They stated, for instance, that silence is an argument of consent, on the part of a woman, only when she is addressed by her near guardian or by the *Kazee*, of which point of Law illiterate persons might not be aware, and that where the bride does not appear in person, which is usual in this country, it is requisite that her agent should prove his commission to act on her behalf by witnesses, in the presence of a *Kazee*. One grand distinction between the Mahomedan Law and our own, and in which the former resembles the Civil Law, is that, according to it, the husband and wife are considered as distinct persons, who may have separate estates, contracts, debts, and injuries. *

Their sentence of divorce is pronounced with as much facility as was repudiation among the Romans, in case of espousals. There is no occasion for any particular cause; mere whim is sufficient. I have already alluded to the small inconvenience which this facility produces in practice. Where conscientious and honourable feelings are insufficient to restrain a man from putting away his wife, without cause, the temporal impediments are by no means trifling. Dower is demandable on divorce, and, with a view to the prevention of such a contingency, it is usual to stipulate for a larger sum than can ever be in the power of the husband to pay.

The mode by which a wife is endowed, according to the Mahomedan Law, partakes partly of the nature of a jointure and partly of common dower, accord-

* Browne's Civil Law, vol. i., p. 37.

ing to the Law of England. Where the estate which she is to take is specified, at the time of marriage, or subsequently thereto, it is a jointure to all intents and purposes, and the widow may enter upon it at once, without any formal process; but where no particular estate or amount in money may have been specified, she is entitled to her *Muhr-misl* or proportionate dower, which, it must be admitted, is but ill defined, being so much as it may be found to have been usual, on an average estimate, to endow other females of the same family with. But, whatever the widow may gain in right of dower or jointure, she is not thereby precluded from coming in as one of the heirs, and claiming her indefeasible right of one-fourth, when her husband may have died childless, and of one-eighth, when he may have left children. It is a common practice (as was before observed) to stipulate for dower to an excessive amount, and as this claim precedes that of inheritance, it might be inferred that the rights of children and other heirs are frequently defeated: but this is rarely the case. It seldom happens that a widow contracts a second marriage, and the property generally goes to the children of the original proprietor. There are weighty considerations in favour of the practice. Nothing seems so well calculated to preserve the peace, the property, and the character of families.

Guardians are of two descriptions; natural and testamentary: the natural guardians are the father and father's father, and the paternal relations generally, in proportion to their proximity to succeed to the es-

tate of the minor : the testamentary guardians are the executors of the father and grandfather. The father and grandfather are competent to the office of curator, as well as tutor, or, as they are expressed in the Bengal Code of Regulations, of manager as well as guardian ; their executors (being strangers) can act as curators only, and the other paternal relations as tutors only. From this it would appear, that in providing for the care of minors, the Mahomedan Law partially agrees with the Roman, "committing the care of the minors to him who is the next to succeed to the inheritance, presuming that the next heir would take the best care of an estate to which he has a prospect of succeeding, and this they term the *summa providentia.*"* With a view, however, to afford some protection to the minor, the law requires that, until he be independent, or, according to the more approved doctrine, until he attain the age of seven years, he should remain in the custody of his mother, and in her default, in that of some other female relation ; and indeed, in the *Hidaya*, in treating of this custody, some danger seems to be apprehended from trusting a minor with one who, though sufficiently near in point of relation to inherit the estate, is not near enough to entertain any very strong affection for his ward. It is stated in page 387, vol. 4, "If there be no woman to whom the right of *Hazânit* appertains, and the *men* of the family dispute it, in this case the nearest paternal relation has the preference, he being the one to whom the authority of guardian belongs :

* Blackst. Comm , vol. i., page 461.

(the degrees of paternal relationship are treated of in their proper place) but it is to be observed, that the child must not be entrusted to any relation *beyond* the prohibited degrees, such as the *Mawla*, or emancipator of a slave, or the son of the paternal uncle, as in this there may be apprehension of treachery." This principle of entrusting the guardianship to an heir, has not wanted its advocates. Lord Macclesfield condemned the opposite rule, and declared it not to be grounded upon reason, but to have prevailed in barbarous times, before the nation was civilized.* Solon, it appears, was of the same opinion with the English lawyers; Lycurgus with the Roman.† The Regulations of Government, however have, (as far as the guardianship of the person is concerned) seemed to adopt the maxim of English Law, that "to commit the custody of an infant to him that is next in succession is *quasi agnum committere lupo ad devorandum;*"‡ and, consequently, they are distinctly precluded from the trust by Section II., Reg. I., of 1800, which declares, that "the guardianship is in no instance to be entrusted to the legal heir of the ward, or other person interested in outliving him." The good sense of the Law of Charondas is recognized, who separated the care of the person and estate, giving that of the latter to the next heir.‖ By Section VIII., Reg. X., of 1793, it was enacted, that, in the selection

* Blackst. Comm., Note to page 461, vol. i.

† Browne's Civil Law, Note to page 89, vol. i.

‡ Blackst. Comm., page 461, vol. i.

‖ Browne's Civil Law, Note to page 89, vol. i.

of a manager, preference should be given to the legal heirs of the estate; and although that rule has been rescinded, and it is now no longer obligatory to show such preference, where better managers may be procurable, yet the principle of the rule remains unchanged, and the legal heirs are still, at least equally eligible with other persons. The Regulations* of Government also, by defining the age at which persons shall be held to have attained majority, have precluded the occurrence of many disputes which might arise, were this circumstance to be judged of by the indefinite criterion of Mahomedan Law; a criterion more fallible even than that of the hability† of the civilians. The rules relative to guardian and ward are remarkable for their equity and good sense: while scrupulously regardful of the interests of the minor, he is nevertheless not exempted from responsibility, where justice obviously requires that he should be considered liable. On perusing the chapter treating of these subjects (page 70 of this work) it will be seen, that the provisions relating to them do not differ very widely from those contained in Colebrooke's Dissertation on Obligations and Contracts, book iv.,

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* By Section 2, Regulation XXVI., 1793, the minority of both Mahomedans and Hindus is declared to extent to the end of the eighteenth year.

† Liberantur tutelâ masculi quidem pubertate. Puberem autem *Cassiani* quidem eum esse dicunt qui habitu corporis pubes apparet; id est, qui generare potest. *Proculeii* autem, eum qui quatuordecim annos explevit. Verum *Priscus* eum puberem esse in quem utrumque concurrit, et habitus corporis et numerus annorum. *Pandect. Justin.* lib. xxvi., §§ ix.

chap. x., §§ 584, *et passim*, which I have subjoined in a note,* in juxta-position with the original passages of Mahomedan Law on the same subject.

The question of Mahomedan slavery seems to be but little understood : according to strict law, the state of bondage, as far as Moosulmauns are concerned, may be said to be almost extinct in this country. They only are slaves who are captured in an infidel territory in time of war, or who are the descendants of such captives. Perhaps there is no point of law which has been more deliberately and formally determined than this. Its accuracy, it might have been hoped, was established beyond all question ; and yet it is only very lately that a contrary opinion was delivered by a law officer belonging to one of the courts of judicature under this Presidency. I subjoin it, with a translation,† as a curious specimen of the arguments and devices not unfrequently used to mislead,

* The promise or executory agreement of a minor, not apparently beneficial, and still more, one that is on the face of it prejudicial to him, is absolutely void. An engagement apparently beneficial to him is only voidable, yet a contract made by a minor, with the advice and consent of his friends, will be held binding where in conscience it ought. Minors may be charged for trespasses and torts : they are bound by obligations arising from delinquency.

The foot notes in Persian in the previous edition of these remarks have been omitted as not necessary.

† *Question* :—Legally, by how many means is the right of property over male and female slaves acquired ?

Answer :—The original condition of man is freedom, and, in the opinion of the generality of lawyers, mankind becomes a subject of property, solely by reason of infidelity and residence in an hostile country, joined to the fact of subjugation. When infidelity and residence in an hostile country are united in the same individual, all

and to perplex the simplest question. The two principal quotations, which are in support of his opinion, are extracted from the *Jamiooroomooz* and the *Ibrahim Shahee.* The words which are underlined were entirely omitted in the Futwa, and it will be observed, that the omissions are important. The term *Kâhârun* which is the very essence of the sentence, is twice omitted; and it is solely from the use of that word, which sig-

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the qualities of neutral property attach to him. But, as the proprietary right to neutral property depends on subjugation, they continue without proprietors until they are appropriated, in like manner as dominion is established over other property, such as grass, trees, herbs, &c. &c. as is laid down in the *Jami-oo-roomoos* and other authorities; "infidels are slaves in an hostile country, although not the property of any individual." It is proved therefore that infidels in an hostile country are neutral property, and that the proprietary right to them depends on subjugation; but subjugation may be accomplished by various means. One mode is when a Mahomedan ruler conquers an infidel city and makes captive its inhabitants, in which case he is at liberty either to kill or enslave them, as is laid down in the *Hidaya;* "if an *Imam* conquer an infidel country by force of arms, he is at liberty either to slay the captives, or to enslave them." When they are made slaves all the qualities of property attach to them, and they become subjects of purchase, sale, inheritance, and all other legal contracts, in the same manner as other property. The offspring also of female slaves whom their masters may have given in marriage, are the property of their masters. A second mode is when the inhabitants of one hostile country subjugate those of another and make them prisoners; in such case proprietary right is established, as is laid down in the *Futtih-ool-qudeer*, the *Aulumgeeree* and the *Hidaya;* "if infidels of Turkistan conquer infidels of Rome and make captives of them or seize their property, they are the rightful proprietors; and if Moosulmauns should afterwards conquer those infidels of *Turkistan*, whatever property of the infidels of *Rome* they may find with those infidels of Turkistan, is lawful to them." A third mode is when the king of an hostile state, having seized men and women, sends them from his own country as presents to a Mahomedan king or other person of distinction; in

nifies *vi et armis*, that any support is derived to the doctrine, of infidels taken by robbery, being slaves

such case proprietary right is established, as *Mokawkus*, the governor of Egypt, sent Mary the Copt from Alexandria as a present to the Prophet, who treated her as a slave. A fourth mode is when a *Moostamin*, having gone into an hostile country, submits to the form of marriage with an infidel woman, and pays the amount of her dower to her guardians, and brings her out of that country by force and arms; in such case proprietary right is established, as is laid down in the *Futtih-ool-qudeer* and other authorities; "if a person marry an infidel woman in an hostile country, and then forcibly bring her into a Moosulmaun territory, the marriage will be good and she will become a subject of sale." A fifth mode is when a Moosulmaun enters a hostile country under protection, and purchases from one of the inhabitants of that country his son or daughter, in such case proprietary right is established, as is laid down in the *Jami-oo-roomooz* and other authorities: "if a Moosulmaun enter their country under protection, and purchase from one of them his son, and then bring him forcibly into a Moosulmaun territory, he becomes the proprietor of him; but the generality of lawyers are of opinion that the purchaser is not proprietor of him in his own country, and this is the correct opinion." A sixth mode is when a Moosulmaun or an infidel alien enters a hostile country, whether with or without protection, and takes an inhabitant of that country either by theft or plunder, and brings him either into a Mahomedan or into another country, in such case proprietary right is established; as is laid down in the *Ibrahim Shahee*, the *Sirajyah*, and other works; "if a Moosulmaun enter an hostile country under protection, and having taken a boy by robbery bring him to us, the boy will be a Mahomedan: the contrary would be the case if he had purchased, and then brought him out, in which case he would continue of his own religion. It is not mentioned in the case first put, whether the boy should be considered free or a slave. It is fit however that he should be considered a slave. I heard my preceptor Iftikhar-ool Ayma Zahir Ul Bokharee say, that he had purchased a female native of Turkistan, and that he married her under the apprehension that she might have been taken by robbery, or fraud, or similar means. From this it would follow that a person so taken is not a slave, but the received opinion is that he is a slave, inasmuch as the cause of proprietary right

in the legal acceptation of the term ; the exertion of such force being held by some authorities to consti-

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is the taking *vi et armis*, which the term "robbery" may imply." The seventh mode is when an infidel alien enters a Mahomedan territory, without seeking protection, and a Moosulmaun seizes him, in which case he is the property of the whole Moosulmaun community; as is laid down in the *Ibrahim Shahee* and other works; "if an infidel alien enter a Mahomedan territory without protection, and a man seize him, he becomes the property of the whole community of Moosulmauns; and, according to the opinion of *Yoosuf* and *Moohummud*, he belongs to the seizer alone. If, by any one of these various modes of subjugation, the inhabitant of an hostile territory come into the possession of a Mahomedan, he will be subjected to the laws of slavery, even though no holy war be waged against the infidel country; and, as in most countries, particularly in *Hindostan*, holy wars have ceased to be waged, the practices of purchase and sale, and the other modes of subjugation above-mentioned prevail. Some lawyers also have maintained the validity of the sale of freemen in difficulty and famine, as is laid down in the *Futawa Itabeeya*, the *Zukheera*, the *Moheet* and other authorities; "Mahomed was interrogated relative to the case of a freeman who sold himself from fear of perishing through famine: he replied, that the sale of himself by a freeman, under such circumstances, is allowable, but not otherwise. He was further questioned as to whether connexion with a female, sold under such circumstances, was legal: and he replied in the affirmative, and that the parentage of the offspring would be established in the father." It is stated in the *Moheet* that the sale of a freeman is not allowable unless he be unable to discharge a debt which is due from him, or unless he be distressed, being involved in difficulties which endanger his existence, or be reduced to such an extremity as would justify his eating carrion (in which instances it is lawful) because in the time of Joseph, men were in the habits of selling themselves. It is laid down in the *Futawa Mokhtusuri Shafee*, that it is allowable for weavers, coblers, and certain other descriptions of infidels, to sell their own persons, even though not in time of famine or difficulty, conformably to usage: "for the usage of each country is different, and the peculiar usage, whatever it may be, is allowable." On this authority many lawyers have given opinions as to the validity of purchase and sale by the infidels of this country, and by the mountaineers of their own

tute *isteela* or subjugation. The Story of Mary the Copt is quite out of place,* as it is notorious that

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persons and of their wives and children, should it be customary and not objected to among them ; and persons thus sold are also legal slaves.

* I cannot perhaps better verify this assertion than by quoting an entract from a note of the learned Sale on the chapter of the *Korân* which was revealed to enable Mahomed to absolve himself from an engagement which he had made to refrain from cohabiting with the said Mary, "Mahomed having lain with a slave of his, named Mary, of Coptic extract, (who had been sent him as a present by Al Mokawkas, governor of Egypt,) on the day which was due to Ayesha, or to Hafsa, and as some say, on Hafsa's own bed, while she was absent, and this coming to Hafsa's knowledge, she took it extremely ill, reproached her husband so sharply, that, to pacify her, he promised with an oath, never to touch the maid again (2) ; and to free him from the obligation of this promise was the design of the chapter. I cannot here avoid observing, as a learned writer (3) has done before me, that Dr. Prideaux has strangely misrepresented this passage. For having given the story of the prophet's amour with his maid Mary, a little embellished, he proceeds to tell us, that in this chapter Mahomed brings in God, allowing him, and all his Moslems, to lie with their maids when they will, notwithstanding their wives : (whereas the words relate to the prophet only, who wanted not any new permission for that purpose, because it was a privilege already granted him (1), though to none else :) and then, to shew what ground he had for his assertion, adds, that the first words of the chapter are, O prophet, why dost thou forbid what God hath allowed thee, that thou mayest please thy wives? God hath granted unto you to lie with your maid servants (2). Which last words are not to be found here, or elsewhere, in the *Korân*, and contain an allowance of what is expressly forbidden therein (31) ; though the doctor has thence taken occasion to make some reflections which might as well have been spared. I shall say nothing to aggravate the matter ; but leave the reader to imagine what this reverend divine would have said of a Mahomedan, if he had caught him tripping in the like manner." It is written also in the *Korân*, "O Prophet, we have allowed thee thy wives unto whom thou hast given their dower, and also the slaves which thy right hand possesseth, *of the booty* which God hath granted thee," on which Sale has observed in a note, "It is said, therefore, that the women slaves which he should buy are not included in this grant." Sale's Koran, vol. II., page 281.

Mahomed had many privileges which are denied to the votaries of his religion. Without further comment I leave the reader to judge of the *animus* which dictated the misquotation.

Of those who can legally be called slaves but few at present exist. In the ordinary acceptation of the term, all persons are counted slaves who may have been sold by their parents in a time of scarcity, and this class is very numerous. Thousands are at this moment living in a state of hopeless and contented, though unauthorized, bondage. That the illegality of this state of things should be known is certainly desirable. The law may interpose its authority in cases of peculiar hardship and cruelty. I believe, however, it will be found, that there is little moral necessity for such interposition. In India (generally speaking) between a slave and a free servant there is no distinction but in the name, and in the superior indulgences enjoyed by the former: he is exempt from the common cares of providing for himself and family: his master has an obvious interest in treating him with lenity, and the easy performance of the ordinary household duties is all that is exacted in return. The importation of slaves by sea has been prohibited, and human beings, it may be hoped, have, in this quarter of the world, ceased to be commodities of merchandize. The sales of children, which do take place, are (setting aside the fact of their illegality) devoid of all the disgusting features which characterize the Slave Trade: they are not occasioned by the *Auri sacra fames*, but by absolute physical hunger

and starvation ; and the morality must be rigid indeed, which would condemn as criminal, the act of a parent parting with a child, under circumstances which render the sacrifice indispensable to the preservation of both.*

Slaves, in the legal acceptation of the term, are certainly considered merely as *things:* they are subject, as other property, to the common Law of Inheritance ; and they cannot be manumitted to the prejudice of heirs or creditors : they may, by special licence, be allowed to trade, but, generally speaking, they have no civil rights or capacities.

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* Since writing the above I have met with some observations of Mr. H. T. Colebrooke in the third volume of Mr. Harington's Analysis, pages 745 and 747, which so fully justify the opinion I have ventured to express, that I cannot resist the gratification of quoting them here, "Indeed, throughout India, the relation of master and slave appears to impose the duty of protection and cherishment on the master, as much as that of fidelity and obedience on the slave : and their mutual conduct is consistent with the sense of such an obligation : since it is marked with gentleness and indulgence on the one side, and with zeal and loyalty on the other. During a famine, or a dearth, parents have been known to sell their children for prices so very inconsiderable, and little more than nominal, that they may, in frequent instances, have credit for a better motive than that of momentarily relieving their own necessities, namely, the saving of their children's lives, by interesting in their preservation persons able to provide nourishment for them. The same feeling is often the motive for selling children, when particular circumstances of distress, instead of a general dearth, disable the parent from supporting them. There is no reason to believe that they are ever sold from mere avarice, and want of natural affection in the parent : the known character of the people, and proved disposition in all the domestic relations, must exempt them from the suspicion of such conduct : but the pressure of want alone compels the sale, whether the immediate impulse be consideration for the child, or desire of personal relief."

The rules relative to endowments are worthy of attention: under the existing regulations, it is true, that a check has been put to appropriations of land for pious purposes; but there still remain many ancient endowments scattered over different parts of India, which the liberality of the British Government has permitted to continue devoted to the purposes designed by their founders. The authority which the State has reserved to itself over these institutions is merely intended for the purposes of preservation, and is consistent with what the Mahomedan Law itself permitted to the ruling power.*

The rules relative to debtors, in general, are extremely lenient: perhaps the most prominent instance of this, which can be cited, is the case of several persons contracting a joint obligation in favour of another. As the principles of the Mahomedan Code exactly coincide with those of the Civil Law, I cannot exemplify the rules on the subject more effectually than by extracting the following passage from Pothier, "Solidity may be stipulated in all contracts of whatever kind; but regularly, it ought to be expressed; if it is not, when several persons have contracted an obligation in favour of another, each is presumed to have contracted as to his own part. And this is confirmed by Justinian in the Novel (99). The reason is, that the interpretation of obligations is made, in

* See Prin. Endowments, pages 69, 70 and 71, and Regulation XIX., 1810, for the due appropriation of the rents and produce of lands granted or the support of mosques, temples, colleges, and other purposes, &c. &c.

cases of doubt, in favour of debtors, as has been shown elsewhere. According to this principle, where an estate belonged to four proprietors, and three of them sold it *in solido*, and promised to procure a ratification by the fourth proprietor, it was adjusted that the fourth, by ratifying the sale, was not to be considered as having sold *in solido* with the others : for, although the three had promised that he should accede to the contract of sale, it was not expressed that he should accede *in solido*."* Numerous other examples might be adduced to show that the Law leans entirely in favour of those against whom a claim may be made, and who may have committed no wilful wrong. This system, if not in all cases reconcileable with strict justice, is at least captivating, from the apparent benevolence of the motives by which it is governed.

The rules relative to the pursuit of remedies by action do not seem to require particular comment. Surperseded as they have been by the Regulations of Government, they are now rather matter of curiosity than utility. Their provisions more nearly assimilate to those of the Civil Law than our own. Thus, the oath of the parties, or their refusal to swear, constitutes one mode of arriving at judgment, in default of better evidence.† A defendant may plead the

* Vol. I., page 147.

† In speaking of the defects of the Common Law, Mr. Justice Blackstone observes, "The principal defects seem to be, first, the want of a complete discovery by the oath of the parties. This each of them is now entitled to have by going through the expence and circuity of a

general issue, and at the same time adduce special matter to evade the plaintiff's claim. If the special matter so pleaded be such, that, by the failure to prove it, the claim of the plaintiff would not be established, the *onus probandi* does not rest with the defendant; although, by the proof of it, the claim of the plaintiff would fall to the ground, for it is a maxim, that, "*ei incumbit probatio qui dicit non qui negat.*" But where the special plea is such, that, by the failure to prove it, the claim of the plaintiff would be established, the *onus probandi* rests with the defendant. As if, in case of a debt upon contract, the defendant were to plead "*nihil debet,*" and at the same time to allege the poverty of the plaintiff to have been such as to be incompatible with his demand. Here, if he failed to prove the latter allegation, the claim of the plaintiff would nevertheless remain to be proved, and, to put the defendant therefore to the proof of it would be mere waste of time. But if he were to plead "*solvit ad diem,*" the *onus probandi* would rest with him, because here, on failure of proof, the claim of the plaintiff would be established.

It is a general rule, that no claim is admissible which is repugnant to a former admission of the claimant, and which cannot consistently stand with such admission; for instance, a person having admitted that a certain article was the property of another, cannot afterwards claim such article on the plea of his having purchased it at a period antece-

court of equity; and therefore it is sometimes had by consent, even in the courts of law." Vol. iii., page 381.

dent to that of his having made the admission; nor can a person, having adduced a claim to property, either in virtue of purchase or of inheritance, subsequently claim the same property in virtue of alleged gift, though if the claim in virtue of gift had been prior in point of date, a subsequent claim, either of purchase or of inheritance, would have been maintainable.*

If a person claim the proprietary right to any thing, specifying a date from which his right began to accrue, and the party in possession plead proprietary right in virtue of purchase, also specifying a date from which his right began to accrue, for instance, if A sue B for a house in the possession of B, stating that he (A) acquired the right to it a year ago, and B adduce evidence to prove that he purchased it from C two years ago, this evidence will not avail B, because he merely stands in the place of C, whose proprietary right to the house it is necessary to prove before the transfer can acquire validity; and inasmuch as the possession of the purchaser rests on the same title as that of the seller, the case is the same as if A had sued C originally; in which case the evidence of A would have been entitled to preference; it being a maxim in law, that evidence is wanting

* As I did not deem the points of Mahomedan Law, contained in this and the following passages, to be of such prominent importance as to warrant their admission among the principles, the authorities for which have been separately laid down, I think it better to cite, as I go along, the original text, and the following extracts from the *Futawa-i-Hummadee* and other works, will serve to show that the doctrines here laid down are conformable to the law of which I am treating.

to prove a right not *primâ facie* apparent, and between the person in possession and the person out of possession, the evidence of the latter is entitled to preference, his title not being *primâ facie* the more apparent. This rule is universally admitted to apply if A and B had not specified dates, or if they had specified the same date; but if they specified different dates the evidence of the claimant who asserts the prior date should, according to one opinion, be received in preference, whether he be in or out of possession. If C claim property in the possession of B, which he (B) had purchased from A, alleging that A had previously farmed or pawned it to him, no action will lie against B until C produce A, and prove his assertion against him; and if A bring an action against B for property in the possession of the latter, and B plead that the property belongs to C from whom he had received it in pledge or the like, this is a sufficient answer to the claim; but if A's claim be founded on any act done by B, for instance, if he allege that B had stolen or usurped the property, it is not sufficient that B plead his having obtained the property from a third person, because here a specific act is alleged, independently of the question of proprietary right, which is quite distinct; for a person not in possession might be charged with it, whereas, in a claim of proprietary right, an action against the party in possession alone is maintainable. If A sue B for property, of which B is in possession, and B reply that he had purchased it from A himself, analogy would suggest that B be immediately dispos-

sessed of the property, because he admits the fact of the property having belonged to A, and adduces a new claim by purchase on his own account; but by a more favourable construction (which is always preferred to analogy) the rule of practice is, that B should be continued in possession for three days, on security, to enable him to adduce proof of his allegation. If a person being sued for a debt, answer that he owes it, but that it was contracted in gambling, or by other unlawful means, his evidence to this plea should be received, if he have any, and if he have no evidence, his denial on oath should be credited, because his admission of the debt was coupled with a plea which avoided it. In the case of any specific article claimed from the estate of a person deceased, one of the heirs may defend the suit; but not if the specific article claimed be not in the possession of the heir against whom the action is brought. It is different in the case of a debt, as in such case one heir may defend the suit, even though he may have no assets in his hands. If a person having sold some property to another, afterwards desire to rescind the contract, on the plea of his not having been authorized to make it, his claim is inadmissible; because the fact of his having entered into the contract is proof against him of his admission, either that the property was his own, or that he had due authority to make the sale, and, under such circumstances, he cannot be permitted to adduce evidence which would be repugnant to his own admission; nor can he put the defendant to his oath in this case, if he have no evidence, because the

taking of evidence, on the part of the plaintiff, and the administration of an oath to a defendant, are consequent to the admissibility of a claim, but the claim itself is in this instance inadmissible. In cases of deposit, generally, where there is a dispute either about the restoration or the loss of the article deposited, the presumption is in favour of the depositary, and his assertion and the evidence adduced by him are entitled to preference in matters simply of trust, where no responsibility would be incurred in the event of the proof of the allegation; but if the allegation be of such a nature as would leave responsibility attaching to the depositary, notwithstanding the proof of the plea, the evidence which he adduces for his own acquittance should be preferred, but not his assertion; for instance, where there is no evidence, if a depositary were to plead that he had returned the deposit by a member of his own family, his assertion on oath should be credited, but not if he pleaded that he returned it by a stranger; because, it is lawful for a depositary to entrust a deposit to the members of his own family, but not to strangers. If the proprietor of a deposit desire the depositary to deliver it to his (the proprietor's) brother, and on the brother coming to take it accordingly, the depositary tell him to come again for the purpose of receiving it, and on the brother's return he tell him that the property was lost before he came for it the first time, the presumption will be against the depositary, and he will be responsible for the value of the deposit, from the manifest inconsistency of the latter assertion. If the

proprietor of a deposit desire the depositary to deliver it to a third person, and the depositary assert that he had done so, the person specified, and proprietor both denying his assertion, the presumption will be in favour of the depositary, and his assertion on oath is to be credited ; but the third person is nevertheless not to be held responsible. If, however, the proprietor deny having desired that the property should be delivered to a third person, the presumption will be in his favour, his assertion on oath is to be credited, and the depositary should be held responsible. So, also, if the third person admit having received the deposit, but state that he had lost it; and the proprietor deny having commissioned the third person to receive it, the presumption will be in favour of the proprietor, and the depositary will be responsible ; nor will he have any remedy against the person to whom he delivered the deposit, unless that person had become his surety for the purpose of indemnification. If a creditor send a third person to his debtor to receive the amount of the debt due to him, and the messenger having realized the amount from the debtor, allege that he had paid it over the creditor, and the creditor deny having received the amount, in this case the presumption will be in favour of the messenger, whose assertion on oath should be credited, and the debtor should be freed from his obligation ; but if the messenger, having received the amount from the debtor, allege that he lost it on his way back to the creditor, the loss will fall on the debtor ; because it was at his option to trust or not to trust the messenger sent

by the creditor, whose property it cannot be said to be, until it come to hand. If a person, with whom property was left in deposit, assert that he gave it back to the proprietor at a certain place on a certain day, in this case it is not permitted to the proprietor to bring evidence that the depositary, on the day indicated, was not at the place where he alleged the re-delivery to have occurred ; but he may bring evidence to the fact of the depositary's having acknowledged that he was at another place. If a borrower and lender (of a horse for instance) dispute as to the time for which it was to be lent, or the place to which it was to go, or the burden which it was to carry, the presumption is in favour of the lender, and his assertion on oath should be credited ; and if a borrower have used articles borrowed, in a certain way, and plead that he had the permission of the lender, who denies the assertion, in this case, also, presumption is in favour of the lender, and the borrower will be answerable for any damage substained, unless he can adduce evidence to prove the permission of the lender.

If a person claim property, on the plea that he had deposited it with another, and the defendant deny having the deposit, and the claimant afterwards adduce evidence to prove that he had actually deposited the property with the defendant, it is still open to the defendant to plead that the deposit was destroyed or returned ; because these two pleas can both consistently stand, but he cannot plead under such circumstances that he never received the deposit, as that would contradict what had already been proved.

The answer of a defendant, though proved, may be repelled in certain cases by the rejoinder of the plaintiff; for instance, if a person sue another for a debt, and the defendant plead that the plaintiff had remitted it, and prove such plea, and the plaintiff subsequently bring forward evidence to prove that the defendant acknowledged the debt, he will be compelled to pay, if he made no mention of the acknowledgment in his answer, as then the remission may be presumed to have been made on account of another debt; but it is sufficient for a defendant to prove that the plaintiff, who claims property in his (the defendant's) possession, had solicited the gift of such property.

Similarity of hand-writing is not much respected as evidence; for instance, if a man sue another for a debt, producing a written acknowledgment, which the defendant denies, the claim should not be adjudged on proof of similitude of hand-writing, but if the defendant admit his hand-writing, but deny all knowledge of the contents of the document, he should not be credited, supposing the tenor of the writing to be plain, familiar, and such as is used in epistolary correspondence. The defendant will also be responsible, if the document be drawn up in legal form, such as a bond or other obligation, and if he called persons to witness that he had signed to the declaration therein contained. If a man execute a document in the presence of others, and read it to them, they are competent to bear evidence against the obligor, whether he desired them to be witnesses

or not; but even though desired, they are not competent witnesses, if they are ignorant of the contents of the document. It is a general rule that the entries in banker's books should be received as good evidence.

These specimens will suffice, as a general outline of the Mahomedan Law of pleadings and evidence, to show that its principles are consistent with equity and good sense. It will be seen that its rules are in unison with those of the most approved systems of jurisprudence, and that, that most equitable of all maxims "*melior est conditio defendentis*" receives its due consideration. Their preference of male to female evidence (which by the bye is not peculiar to this code*) and other irrational distinctions are, of course, not attended to in the practice of our Courts.

I shall conclude these remarks with a few observations on the Mahomedan Law of bailment; and first of that description of bailment which is termed deposit. This is defined to be the delivery of property to another for the purpose of preservation; which property becomes a trust in the hands of the bailee, who is not responsible in case of loss.† The reason of the rule in favour of depositaries is thus given in the *Futawa-i-Hummadee*. His undertaking to preserve the property for the proprietor is a gra-

* The testimony of women is always received when it is *necessary*, *i. e.*, when the fact cannot be proved without them; and it is seldom admitted where other witnesses can be had.—Erskine's Principles of the Scottish Law, page 475.

† This definition nearly agrees with that of the Civil Law.

tuitous act of kindness, which should not involve responsibility; and although the permitting a loss which can be avoided, certainly implies a deficiency of caution, yet, entire exemption from culpability is not necessary, in this instance, as it is in a contract mutually beneficial.* This however is the general rule, to which there are undoubtedly exceptions. A depositary cannot legally entrust the deposit to the care of a stranger. He should not retain it after the proprietor has required him to deliver it up. He should not fraudulently deny his possession of it, or mix it with his own property so that it becomes undistinguishable, nor should he transgress his authority by making beneficial use of the property deposited.† In all these instances he will be responsible for any loss that may accrue. A depositary will also be considered guilty of transgression if, having been forbidden so to do, he carry the deposit on a journey, or if he unnecessarily take it to a place where danger may be

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* Depositum est quod custodiendum alicui datum est.—Pandect. Justin. lib. xvi., tit. iii., culpæ autem nomine, id est desidiæ ae negagentiæ, non tenetur. Inst. lib. 3, tit. xv., §§ iii.

Consonat quod ait Ulpianus. Nunc videndum est quid veniat in commodati actionem; utrum dolus an et culpa, an vero et omne periculum. Et quidem in contractibus interdum dolum solum; interdum et culpam præstamus. Dolum in deposito: nam quia nulla utilitas ejus versatur apud quem deponitur, merito dolus præstatur solus; nisi forte et merces accessit.—Justin. Dig. lib. xiii., tit. vi., sec. 2, §§ xii.

† These provisions nearly correspond with three of the six species of deceit enumerated in the Code of Justinian, "De variis speciebus doli ex quibus actio depositi nascitur. Prima species; si depositum non reddatur statim. Secunda; si reddatur res dolo depositarii deterior facta. Quinta: si dolo depositarius rem habere desierit. Lib. xvi., tit. 3, s. 2.

apprehended; and, even though the proprietor may not have forbidden the removal of the deposit, if it be of such a nature as that its carriage would be attended with expence. In all these cases he is held responsible. Gross negligence also induces responsibility, but in order to ascertain what constitutes such negligence, the customs of the place at which the transaction occurred should be taken into consideration. For instance, the case was put of a depositary, who, having placed the deposit in the chamber of an inn, to which there was a common court-yard, went out, having fastened the door with a string, but not having locked it. In his absence the deposit was stolen. Here, in order to determine whether the depositary should or should not be responsible, it must be ascertained whether the mode of securing the door, which he adopted, was considered generally safe at the place, or whether it was usual to lock the door.

The above rules are equally applicable to every description of bailee, with the exception of that relative to the removal of the property bailed, which does not apply strictly to carriers.

Hire or *locatio*, is, according to the Mahomedan Law, defined to be a contract of usufruct for a return.* "A contract of hire is not valid unless both the usufruct and the hire be particularly known and specified. Whatever is lawful as a price, is lawful also as a recompense in hire; because the recompense is a price paid for the usufruct, and is therefore ana-

* Locatio conductio est contractus, quo de re fraendâ, vel faciendâ, pro certo precio convenit. Pand. Justin. lib. xix., tit. ii.

logous to the price of an article purchased. The extent of usufruct may be defined by fixing a term ; as in the hire of a house for the purpose of residence, or the hire of land for the purpose of cultivation. A contract of hire, therefore, stipulated for a certain term, to whatever extent, is valid ; because upon the term being known, the extent of the usufruct for that term is also known. Usufruct may also be ascertained by a specification of work, as where a person hires another to dye or sew cloth for him, or an animal for the purpose of carrying a certain burden, or of riding upon it a certain distance. Usufruct may also be ascertained by specification and pointed reference ; as where a person hires another to carry such a particular load to such a particular place :" In these examples we find the three sub-divisions of this bailment, as laid down by Sir Wm. Jones, the *locatio conductio rei ;* the *locatio operis faciendi* and the *locatio mercium vehendarum.* With respect to the first sub-division, I cannot find that the Mahomedan Law makes any distinction between the responsibility of an hirer and that of a borrower. But with respect to the two last, the distinction laid down by Sir Wm. Jones, that where skill is required, as well as care, in performing the work undertaken, the bailee for *hire* must be supposed to have engaged himself for a due application of the art, and the distinction between common carriers and other individuals seem to have been adopted also by the Mahomedan Law. Thus, if a thing perish in the hands of a common carrier, while performing his work, he is respon-

sible; but not otherwise:* so also, if a tailor, in the exercise of his trade, spoil the cloth entrusted to him, he will be responsible for the value of it;† but if it be damaged or lost, not by means connected with the exercise of his trade, the tailor would not be held responsible; thus, for instance, though the cloth was stolen from his house, at a period subsequent even to the day on which he had engaged to redeliver it, no responsibility will attach to him. "Actions against mandataries," Sir William Jones observes, "are indeed very uncommon, for a reason not extremely flattering to human nature; because it is very uncommon to undertake any office of trouble *without compensation.*" This reason, I fear, loses none of its weight among the orientals, and I have not met with any provisions, in their law books, which suppose the possibility of such an undertaking.

On the subject of that species of bailment which is termed *commodatum* or loan for use, I do not find that there is much difference of opinion between the Mahomedan and the Roman or the English laws.‡ The definition given of it in the *Shurhiviqaya*, and in

* The first of these examples seems to coincide with the doctrine of Ulpian, as laid down in the Pandects, and the second to oppose it; "Si quis vitulos pascendos, vel sarciendum quid poliendum ve conduxit culpam eum præstare debere, at quod imperitiâ peccavit; culpam esse. Quippe ut artifex (inquit) conduxit." Lib. xix., de loc. con.

† Si fullo vestimenta polienda acceperit, eaque mures roserint; ex locato tenetur quia debuit ab hac re cavere. Et si pallium fullo permutaverit et alii alterius dederit; ex locato actione tenebitur etiamsi ignarus fecerit.

‡ Commodatum est contractus quo res gratis utenda datur ad tempus. Lib. xiii., tit. vi.

the Digest of Justinian is the same; except that, agreeably to the former law, I do not find that any slighter degree of negligence imposes greater responsibility on a borrower than on a hirer or a depositary.* If a person borrow an animal from another, without any specification of time or place, or of the burthen which it is to carry, the borrower may take it wheresoever he pleases, and load it with whatever he thinks proper.

If the conjecture of Sir William Jones be correct, the Mahomedan Law agrees with the Mosaic in its provisions relative to the responsibility attached to a borrower, who is responsible in case of loss, should he at the time be out of sight of the thing borrowed.† For instance, if a person borrow a horse and enter a house, leaving the horse in the street so as to lose sight of it, and it be lost, the borrower will be responsible for its value. This species of loan also is distinguished from the *mutuum* or loan for use;‡ in which species of bailment, according to the Mahome-

* A loan is a trust, and if it perish without transgression (on the part of the borrower) he is not responsible.

† "By the Law of Moses, as it is commonly translated, a remarkable distinction was made between the loss of borrowed cattle or goods, happening in the *absence*, or the *presence* of the owner: for, says the divine legislator, "if a man borrow aught of his neighbour, and it be hurt or die, *the owner thereof* not *being with it*, he shall surely make it good; but if the *owner* thereof be with it, he shall *not* make it good:" now it is by no means *certain*, that the original word signifies the *owner*, for it may signify the *possessor*, and the law *may* import, that the borrower ought not to lose sight, when he can possibly avoid it, of the thing borrowed."

‡ I call it after the French lawyers, *loan for use*, to distinguish it from this loan for consumption, or the *mutuum* of the Romans; by which is

dan Law, also, the value of the loan must be restored, whatever accident may happen to the borrower; contrary to the case of a loan for use.*

A pledge is defined to be the giving a thing in security for the satisfaction of some right, such as a debt.† A pawnee may either watch over the pledge himself, or he may devolve the care of its preservation upon his wife, child, or servant, provided he be of his family. If, on the contrary, he commit the care of it, or resign it in trust, to one who is not of his family, he becomes the security. "If a pawnee commit any transgression with respect to the pledge, he must make reparation to the whole amount of the value; in the same manner as in a case of usurpation; for the amount in which the value of the pledge exceeds the debt is a trust; and a transgression with respect to a trust, renders the person who commits it liable to make complete reparation. A pledge is insured in the possession of the pawnee to whatever is the smallest amount the debt of the

understood the lending of *money*, *wine*, *corn*, and other things that may be valued by number, weight, or measure, and are to be restored only in equal value or quantity.—Law of Bailments.

* The loan of *dirms* and *deenars*, and of articles estimated by *measurement of capacity*, by *weight*, or by *tale*, is considered in the light of *kars*.—The principle on which this proceeds is, that *Areeat* is an investiture with the use (of the property lent;) and as this cannot be obtained, with regard to these articles, without a destruction of the substance, it must, with respect to them, be necessarily considered as an investiture with the substance.—Now an investiture of this nature is to be considered in two lights, a gift or a loan.—*Hidaya.*

† Pignus est jus creditori in re constitutum quo licet ei illum possidere in securitatem debiti; eamque distrahere, ut ex pretio debitum consequatur. Pand. Justin. lib. xx., De pignoribus, &c.

pawnee, or the value the pledge bore at the time of its being deposited. Thus, if a pledge, equivalent to the amount of the debt, perish in the pawnee's hands, his claim is rendered void, and he thereby, as it were, obtains a complete payment. If, on the contrary, the value of the pledge exceed the amount of the debt, the excess is in that case considered as a *trust*, and the whole of the pawnee's claim is annulled, on account of the decay of that part of the pledge which is equivalent to the amount thereof; and the remainder (the excess), as being held in trust, is not liable to be compensated for, and consequently the pawner sustains the loss of it. If, on the other hand, the value of the pledge be *less* than the debt, the pawnee forfeits that part of his claim only which is equal to the value of the pledge, and the balance, or excess, must be paid to him by the pawner."

From the above observations it will be seen that simple depositaries and (by parity of reasoning) mandataries, are responsible only in case of transgression or gross negligence, the former consisting in disobeying the injunctions of the bailor; in unnecessarily exposing the property bailed to danger; in refusing to deliver up possession of it; in confiding the care of it to a stranger, or other overt acts of a similar nature which imply wilful wrong; the latter in that total deficiency of care, which amounts to gross negligence, and which must be judged of according to the circumstances of each case; that a borrower for use, and a hirer (regarding whom the law is the same), are responsible under similar circumstances, with this

additional provision, that, in the case of hired or borrowed cattle, the bailee will be responsible, if, at the time of their being lost, they were out of his sight, this being *primâ facie* evidence of gross negligence; that persons hired to perform any work, or to carry goods from one place to another, will be responsible under similar circumstances, with this additional provision, that, in the case of professional workmen and common carriers, if damage or loss accrue to the property bailed, in the exercise of their vocation, it will be attributed to gross negligence; that a pawnee is answerable, under similar circumstances, for the whole value of the pledge; that if the pledge be lost by any means, his debt is extinguished, if the property pawned equal or exceed it in value; and that a borrower for consumption is answerable at all events.

Now I cannot help being of opinion that the whole of this doctrine is consistent with reason and good sense. The law, as laid down by Sir Wm. Jones, is, that "a pawnee shall not be discharged, if the pawn be simply *stolen* from him, but if he be forcibly robbed of it, *without his fault*, his debt shall not be extinguished. He admits that this species of bailment is beneficial to the *pawnee* by securing the payment of his debt, and to the *pawner* by procuring him credit. In other words, the contract is mutually and reciprocally advantageous. Surely then the contracting parties ought each to be subjected to the same liabilities, and it ought to follow, as a necessary consequence, that if the borrower was robbed of the money, the

pawnee should lose his debt. This, however, I do not find to be any where admitted. The reason of the rule in favour of the pawnee seems to be the same as that which is assigned for making a distinction between the borrower for use and the borrower for consumption, and rendering the latter liable in a case where the former is not; which is, that when money, and other things capable of valuation by number, weight, or measure, are lent for consumption, they are to be restored only in equal value or quantity; and these things, say the civilians, *nunquam pereunt:** whereas, in loans for use, the articles are to be re-delivered specifically, and *therefore* the owner must abide the loss if they perish through inevitable accident. Now the argument seems rather more specious than solid. Would it not be more equitable, as the specific things cannot be re-delivered, to cause their value to be restored? By the opposite doctrine this apparent anomaly is introduced, that a borrower for use, who has the entire and exclusive benefit of the articles borrowed, shall not be responsible for an accident, which, occurring with a pawnor (who is only a participator with the pawnee in the benefit of the transaction) would render him answerable. Suppose the case of a man who, having five pieces of money which (as being the gift of a relation, or from any other cause) he is unwilling to exchange, were to borrow

* Ratio disparitatis est quod; qui rem utendam accipit ejus rei in specie debitor est: porro obligatio extinguitur rei debitæ interitu. At is qui nummum accepit non nummum quos accepit in specie debitor est, sed generis et quantitatis quæ nunquam pereunt.—Note to Pand. Justin. De actione commodati directa.

five pieces from another individual and to leave his own five with the lender in pledge, and both the pawnor and pawnee were to be robbed of the money borrowed and the money pledged in the same night, does it not appear rather hard that the pawnor (who perhaps derived the least benefit from the transaction) should be subjected to the entire loss? The following case has been cited by Sir Wm. Jones; "*Zaid* had left with *Amru* divers goods in pledge for a certain sum of money, and some *ruffians* having entered the house of Amru took away his own goods together with those pawned by Zaid. And the question was, whether, *since the debt became extinct by the loss of the pledge*, and since the goods pawned exceeded in value the amount of the debt, *Zaid* could legally demand the balance of Amru. To which question the great law officer of the Othman court answered, with the brevity usual on such occasions, Olmaz, it cannot be." Upon this Sir Wm. Jones observes, "we must necessarily suppose that the Turks are wholly unacquainted with the imperial laws of Byzantium, and that their own rules are repugnant to natural justice." Now it is, obviously, to the question that the objection is made, and not to the answer, which is indubitably right, as far as it goes. But where is the repugnancy to natural justice in declaring the debt to be extinct on the loss of the pledge? Would it not be more repugnant to justice to make the borrower pay a debt for which he had already given more than ample satisfaction? And where is the hardship sustained by the lender? According to the doctrine

contained in the law of bailments, if the lender had retained his money, and had derived no benefit from putting it out to interest on good security, he would have suffered *damnum absque injuriâ ;* but having derived such benefit, he can come upon the borrower, who derived only equal, perhaps not so great benefit from the transaction. This would indeed be inconsistent, and, in my humble judgment, not easily reconcileable with natural justice.* I should apprehend it is not the usage in Turkey, as Sir Wm. Jones conjectures, to stipulate that "*amissio pignoris liberet debitorem*" such stipulation being expressly declared by the Mahomedan Law, null and void.†

* I find the following passage in the law of bailments, "It may be right also to mention that the distinction before taken, in regard to *loans*, between an obligation to restore the *specific* things, and a power or necessity of returning *others equal in value*, holds good likewise in the contracts of *hiring* and *depositing :* in the first case it is a regular *bailment*, in the second it becomes a *debt*. Thus, according to Alfenus in his famous law, on which the judicious Bynkershoek has learnedly commented, If an ingot of silver be delivered to a silversmith to make an urn, the *whole* property is transferred, and the employer is only a *creditor* of metal equally valuable, which the workman engages to *pay* in a certain shape : the smith may consequently apply it to his own use; but if it perish, even by unavoidable mischance or irresistible violence, he, as owner of it, must abide the loss, and the creditor must have his urn in due time : It would be otherwise, no doubt, if the *same* silver, on account of its peculiar fineness, or any uncommon metal, according to the whim of the owner, were agreed to be specifically re-delivered in the form of a cup or a standish." Now I must confess that I am dull enough not to see the justice of this law. It is true, that if the specific thing perish it cannot be restored, but where is the reason why the value of it should not be made good. The loss to the bailor is equal, perhaps greater, when the thing bailed is to be returned specifically ; and the culpability, if any, on the part of the bailee, is, in either case, the same.

† A pawner and pawnee agree that if the pledge be lost, its loss shall

As I undertook to furnish a brief outline of the Mahomedan law of bailments I could not have omitted that part of it which relates to pawnees. The doctrine in question militates with that laid down in the law of bailments as expounded by Sir Wm. Jones, and it is therefore not without considerable reluctance that I have treated of the subject; but my fondness (which I am not ashamed to avow) for the *Moosulmaun* Law, induced me to become its humble advocate in the present instance.

In compiling the principles of law contained in this work, I have had recourse to none but the most approved authorities, and I have appended to this work extracts from the original Arabic, to vouch for the accuracy of the doctrines I have laid down.* I

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not be attended with any responsibility; it shall not be so, but the debt becomes extinguished also. If a person give a thing in pledge to another, and the pawnee say to the pawnor; I receive this thing on condition that, if it be lost, the loss shall not be attended with responsibility; and the pawnee assent, the pledge is allowable, but the condition is void. *Futawa-i-Hummadee.*

* I should observe, however, that I purposely avoided consulting books in the first instance, and this I did with a view of avoiding technicalities as much as possible, and where my own knowledge or memory of the law failed me, I generally had recourse to living authorities, referring to books only for the purpose of verification. This will of course occasion considerable dissimilarity in the letter of the rules as they appear in the original and in my compilation, but their spirit I trust has been uniformly preserved. Another cause of dissimilarity is, that some of the principles here laid down are founded on the absence rather than the existence of rules. For instance, I have laid it down as a principle that there is no distinction between real and personal, nor between ancestral and acquired property in the Mahomedan law of inheritance, and this is deduced from the invariable use in the original Arabic of the word *Târâkâ* which includes all descriptions of property. The

have taken care to note any material difference of opinion which I have discovered in these authorities. The precedents consist of legal expositions, which have been actually delivered in the several courts of justice. I have selected such as appeared to me of the greatest importance, and those which seemed to embrace doctrinal points most likely to recur. With a view to retain the sense, as far as practicable, I have left them in the original shape of question and reply; and none have been admitted but such as appeared to me (assisted by all the legal talent I could procure) to admit of no doubt as to their accuracy.

By hazarding some of the preceding observations I am aware that, I may have subjected myself to the rigour of criticism, and, if inflicted, I shall have no reason perhaps to complain. My only defence is, that the active occupations of an official life in India leave but little leisure for literary research; that to cultivate the fields of science, or to mature the fruits of reflection, undisturbed retirement is necessary; and that no more than superficial knowledge and crude conceptions, on any subject unconnected with his immediate profession, can be expected from a man of ordinary capacity, whose time is perpetually absorbed in the dry and distracting details of ministerial duty.

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same observation is applicable to the doctrine laid down respecting primogeniture and a few other instances. I have moreover taken the liberty of introducing what I considered more apposite examples on the doctrine of successions, whenever I conceived that an improvement might be made to the illustrations adduced in the *Sirajya* or *Shureefeea*.

I have no presentiment of fear, however, as to the reception which the following pages will meet with from the liberality and indulgence of the judicial officers for whose benefit they were chiefly intended; and if this book should prove the means of averting one atom of wrong from those who sue for justice, or one moment of anxiety from those who dispense the laws, I shall not consider unprofitable the time that has been occupied, and the labour that has been exerted.

TABLE

OF

SUCCESSION

ACCORDING TO THE BENGAL SCHOOL.

PREPARED

BY

GIRISH CHANDRA TARKALANKAR.

SAPINDAS.*

Son	1
Grandson	2
Great-grandson	3
Widow	4
Maiden daughter	5
Married „	6
Daughter's son (a)	7

* The relation of *Sapindas*, or relatives connected through the medium of undivided oblations, extends no further than the fourth degree and arises from the right to present oblations at the *Parbhana Shradh*, which relates to three ancestors in the paternal and three in the maternal line. 4th Feb. 1870, 5, B. L. R., F. B., p. 15.

(a) If one of several daughters, who had, as maidens, succeeded to their father's property, die leaving sons and sisters or sisters' sons, then, according to the law of Bengal, the sons alone take the share to which their mother was entitled, to the exclusion of the sisters and sisters' sons. Mac. H. L., p. 23, new ed., p. 27.

Conformably to this doctrine, a case which originated in the Zillah Court of Rungpore, was decided by the Sudder Court, on the 19th of April 1820, in which it was determined, (Select Reports, vol. iii, p. 26, new edition, p. 35) that property inherited by a maiden daughter goes at her death to her son or grandson, to the exclusion of her sister and sister's son. The above

Father	8
Mother	9
Uterine brother	10
Step „	11
Uterine brother's son	12
Step-brother's son	13
Uterine brother's grandson	14
Step „ „	15
Father's daughter's son	16
Grandfather	17
Grandmother	18
Uncle	19
Uncle's son	20
Uncle's grandson	21
Grandfather's daughter's son	22
Great-grandfather	23
Great-grandmother	24
Father's uncle	25
Father's uncle's son	26
Father's uncle's grandson	27
Great-grandfather's daughter's son	28
Son's daughter's son (*b*)	29

Ruling has been followed in a recent case Radhakisore Manjee, *vs.* Rajaram Mondul, 4th August 1866. 6, W. R., p. 147. These rulings however do not appear to be consistent with the general principles of the Hindu Law, as the unmarried daughter does not acquire an absolute right in the property inherited by her, and that property therefore on her death ought to go not to her heirs, but to those of her father, who in the case supposed, would be her married sisters, or sisters having male children, or in their default, the sons of her father's daughters then living, who would take *per capita.*—This subject has been discussed at great length in the *Vyavastha Durpana*, p. 147, 2d edition, p. 167.

Verse 30, Section 2, Chapter XI., of the *Dáyabhága* seems to be conclusive on the point.

(*b*) The insertion of the son's daughter's son &c. up to father's uncle's son's daughter's son, in this place before the maternal grandfather, is supported by the authority of *Jagannath Turka Punchanan* (vide Colebrooke's Digest of H. L., Calcutta edition, vol. iv., p. 230, London ed., vol. iii., p. 530.) The principle of this order of succession referred to above has been laid down by the High Court, and the Privy Council in the decisions noted below according to which persons, not expressly named as heirs in *Dáyabhága* or *Mitácharâ*, are declared competent to inherit provided they confer "spiritual benefit on the soul of the deceased owner." (Vide Amrit Kumari Dabi, *v.* Luckhy Narain Chuckerbutty, 2

Grandson's daughter's son	30
Brother's daughter's son	31
Brother's son's daughter's son	32
Uncle's daughter's son	33
Uncle's son's daughter's son	34
Father's uncle's daughter's son	35
Father's uncle's son's daughter's son	36
Maternal grandfather (c)	37
Maternal uncle	38
Maternal uncle's son	39
Maternal uncle's son's son	40
Maternal grandfather's daughter's son	41
Maternal great-grandfather	42
Maternal great-grandfather's son	43
" " " " grandson	44
" " " " great-grandson	45
" " " " daughter's son	46
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Maternal great-great-grandfather's son	48
Maternal great-great-grandfather's grandson ...	49
Maternal great-great-grandfather's great-grandson ...	50
Maternal great-great-granddaughter's daughter's son ...	51

B. L. R., F. B., p. 28; 10, W. R., p. 76. Gireedharee Lall Roy, *v.* the Government of Bengal, 1, B. L. R., P. C., p. 44. Thakur Jibnath Singh, *v.* the Court of Wards, 5, B. L. R., p. 442. Gooroo Gobind Shaha, *v.* Anund Lall Ghose, 5, B. L. R., p. 15. Kurim Chund Gurain, *v.* Oodung Gurain, 6, W. R., p. 158. Gunga Dutt Jha, *v.* Sreenarain Rai, 2, Sel. Rep., new ed., p. 132; 2, M. I. A., p. 132); Mr. Colebrooke's remarks in *Dáyabhága*, Chap. xi., Sec. 6, p. 226, new ed., p. 252, and those of Mr. Macnaghten in his H. L., p. 29, new ed., p. 34, conflicting with the opinion of *Jagannath Turka Punchanan* on this point cannot be considered of sufficient weight in the face of the rulings above cited.

(c) The maternal grandfather inherits before his son the maternal uncle, according to the *Dáyatatwa* of *Raghunandana* and *Cramasangraha* of *Sricrishna*. *Dáyabhága*, Chap. xi., Sec. 6, p. 226, new ed., p. 251.

SACULYAS.*

Great-great-grandson	52
Grandson's great-grandson	53
Grandson's great-great-grandson	54
Brother's great-grandson	55
Brother's great-great-grandson	56
Brother's grandson's great-grandson	57
Uncle's great-grandson	58
Uncle's great-great-grandson	59
Uncle's grandson's great-grandson	60
Father's uncle's great-grandson	61
Father's uncle's great-great-grandson	62
Father's uncle's grandson's great grandson	63
Great-great-grandfather	64
Grandfather's uncle	65
Grandfather's uncle's son	66
Grandfather's uncle's grandson	67
Grandfather's uncle's great-grandson	68
Grandfather's uncle's great-great-grandson	69
Grandfather's uncle's grandson's great-grandson ...	70
Grandfather's great-grandfather	71
Great grandfather's uncle	72
Great-grandfather's uncle's son	73
Great-grandfather's uncle's grandson	74
Great-grandfather's uncle's great-grandson	75
Great-grandfather's uncle's great-great-grandson ...	76
Great-grandfather's uncle's grandson's great-grandson ..	77
Grandfather's great-great-grandfather	78
Great-great-grandfather's uncle	79
Great-great-grandfather's uncle's son	80
Great-great-grandfather's uncle's grandson	81
Great-great-grandfather's uncle's great-grandson ...	82
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SAMANODACAS.†

Seventh in descent	85
Eighth ,, ...	86
Ninth ,, ...	87

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* The relation of *Saculyas*, or relatives connected through the medium of divided oblations, commence with the fifth and extend to the seventh degree.

† The relation of *Samanodacas*, or relatives connected by libations of water, extend to the fourteenth person.

Tenth in descent 88
Eleventh „ 89
Twelfth „ 90
Thirteenth „ 91
Brother's grandson's great-great-grandson 92
Father's eighth in descent 93
„ ninth „ 94
„ tenth „ 95
„ eleventh „ 96
„ twelfth „ 97
„ thirteenth „ 98
Uncle's grandson's great-great-grandson 99
Grandfather's eighth in descent 100
„ ninth „ 101
„ tenth „ 102
„ eleventh „ 103
„ twelfth „ 104
„ thirteenth „ 105
Father's uncle's grandson's great-great-grandson ... 106
Great-grandfather's eighth in descent 107
„ „ ninth „ 108
„ „ tenth „ 109
„ eleventh „ 110
„ „ twelfth „ 111
„ „ thirteenth „ 112
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„ „ ninth „ 115
„ „ tenth „ 116
„ „ eleventh „ 117
„ „ twelfth „ 118
„ „ thirteenth „ 119
Great-grandfather's uncle's grandson's great-great-grandson 120
Grandfather's great-grandfather's eighth in descent ... 121
„ „ ninth „ ... 122
„ „ tenth „ ... 123
„ „ eleventh „ ... 124
„ „ twelfth „ .. 125
„ „ thirteenth „ ... 126
Great-great-grandfather's uncle's grandson's gt.-gt.-grandson 127
Grandfather's great-great-grandfather's eighth in descent 128
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„ grandson's great-grandson	139
„ grandson's great-great-grandson	140
„ seventh in descent	141
„ eighth „	142
„ ninth „	143
„ tenth „	144
„ eleventh „	145
„ twelfth „	146
„ thirteenth „	147
Ninth in ascent	148
His son	149
„ grandson	150
„ great-grandson	151
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„ grandson's great-grandson	153
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„ great-grandson	165
„ great-great-grandson	166
„ grandson's great-grandson	167
„ grandson's great-great-grandson	168
„ seventh in descent	169
„ eighth „	170
„ ninth „	171
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„ eleventh „	173
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„ thirteenth „	175
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His son	177
„ grandson	178
„ great-grandson	179
„ great-great-grandson	180
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„ grandson	192
„ great-grandson	193
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„ grandson's great-grandson	195
„ grandson's great-great-grandson	196
„ seventh in descent	197
„ eighth „	198
„ ninth „	199
„ tenth „	200
„ eleventh „	201
„ twelfth „	202
„ thirteenth „	203
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His son	205
„ grandson	206
„ great-grandson	207
„ great-great-grandson	208
„ grandson's great-grandson	209
„ grandson's great-great-grandson	210
„ seventh in descent	211
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„ grandson's great-grandson	223
„ grandson's great-great-grandson	224
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PRINCIPLES

OF

HINDU LAW.

CHAPTER I.

OF PROPRIETARY RIGHT.

Property is fourfold.

PROPERTY, according to the Hindu law, is of four descriptions, real, personal, ancestral, and acquired. I use the terms real and personal in preference to the terms moveable and immoveable, because, although the latter words would furnish a more strict translation of the expressions in the original, yet the Hindu law classes amongst things immoveable, property which is of an opposite nature, such as slaves and corrodies, or assignments on land.* In a work of this kind, intended solely for the purpose of practical utility, it would be useless to attempt any inquiry as to the origin of the right of property according to the notions of the Hindus, or as to the nature of the tenures of real property in India. The various modes of acquisition, as occupancy, birth, gift, purchase, and the like, have been detailed and commented on with all the elaborate minuteness peculiar to the Hindu jurists. † It seems sufficient here to inquire into the

* *Jim Va.* cited in Dig., vol. iii., page 34.

† Is property included in the seven categories, substance and the rest, or is it distinct therefrom? *Jagannátha* in the Digest, vol. ii., page

nature of that property which is created by birth, for to this source must be traced all the impediments which exists to alienation; a man without heirs having an absolute and uncontrolled dominion over his property, by whatever means acquired. That an indefeasible, inchoate right is created by birth, seems to be universally admitted, though much argumentative discussion has been used to establish that this alone is not sufficient to create proprietary right. The most approved conclusion appears to be, that the inchoate right arising from birth, and the relinquishment by the occupant (whether effected by death or otherwise,) conjointly create this right, the inchoate right which previously existed becoming perfected by the removal of the obstacle;* that is, by the death of the owner (natural or civil), or his voluntary abandonment.† In ancestral real property, the right is

Right of by inheritance how created.

506: and ownership, in his opinion, following the *Nyáya* doctrine, "is a relation between cause and effect, attached to the owner who is predicated, of particular substances, and subsisting in the substance by connection with the predicable."

* *Sricrishna*, cited in the Digest, vol. ii., page 517.

† The fact of the ancestor being missing for a period exceeding twelve years, constitutes a legal title to succession on the part of the heirs. This doctrine was recognized in a case decided by the Sudder Dewanny Adawlut. Ayabuttee Dossee, *v.* Rajkishen Shahoo, on the 25th of April 1820: Reports, vol. iii., page 28, new ed. p. 30, wherein it was determined, that twelve years should be allowed for the re-appearance of a missing person, after which his death will be presumed: but some authorities maintain, that the period varies with reference to the age of the missing person. See note to Case 7, vol. ii., page 9. M. The above point is settled in the recent cases. Manick Koer, *v.* Khudu Lal, 22nd June 1863. Hay's Rep. 623. Jommajoy Mojoomdar, *v.* Keshub Lal Ghose,

always limited; and the sons, grandsons, and great-grandsons of the occupant, supposing them to be free from those defects, mental or corporeal, which are held to defeat the right of inheritance,* are declared to possess an interest in such property equal to that of the occupant himself; so much so, that he is not at liberty to alienate it, except under special and urgent circumstances, or to assign a larger share of it to one of his descendants than to another.† With respect to personal property of every description, whether ancestral or acquired, and with respect to real property acquired or recovered by the occupant, he is at liberty to make any alienation or distribution which he may think fit, subject only to spiritual responsibility.‡ The property of the father being thus restricted in

Restrictions on alienation.

10, W. R., p. 484. An unreported case Regular Appeal, No. 46 of 1868 decided by a Division Court (Loch and Glover J. J.) on the 3rd December 1868. G.

* Various diseases and various offences have been declared by the Hindu legislators to be of such a nature as to disqualify for inheritance. It is problematical how far our courts would go in support of objections which must in some instances be deemed irrational prejudices. The only reported case in which the question has been agitated, may be found in the Bengal Reports, pages 108 and 257, vol. ii.; and in the Bombay Reports, page 411, vol. i., there is a case reported, in which a widow's claim to her husband's estate was disallowed on account of her blindness. For an enumeration of the disqualifying causes, see Digest of Hindu Law, page 298, vol. iii., and Elem. Hin. Law, App. page 335 et seq. and the chap. vol. ii., treating of Exclusion from Inheritance, to the note in which an enumeration of the several disqualifying circumstances has been given.

† *Jagannátha* in Dig., vol. iii., page 45.

‡ *Vrihaspati*, Dig., vol. ii., page 32.

respect of ancestral real property, and wills and testaments being wholly unknown to the Hindu law, it follows, for the sake of consistency, that they must be wholly inoperative, and that their provisions must be set aside, where they are at variance with the law; otherwise, a person would be competent to make a disposition to take effect after his death, to which he could not have given effect during his life-time.* A will is nothing more or less than "the legal declaration of a man's intentions, which he wills to be performed after his death:" but willing to do that which the law has prohibited, cannot be held to be a *legal* declaration of a man's intentions. There may be a gift in contemplation of death, but a will, in the sense in which it is understood in the English law, is wholly unknown to the Hindu system; and such

Of wills.

* For a more full discussion of the right of a Hindu to make a will, see Consideration on Hindu Law, p. 320, wherein the opinion of Mr. Colebrooke is introduced, to which the doctrine here laid down is conformable. See also the case of Huree Bullubh Gungaram, *v.* Keshoram Sheodas, Bombay Reports, vol. ii., page 6, in which the plea of a will in opposition to the claims of heirs was treated as inadmissible, and repugnant to the Hindu law, and the case of Sobharam Sumbhoodas, *v.* Purmanund Bhaeechund, ibid. page 471; also the case of Musst. Goolaub, *v.* Musst. Phool, vol. i., page 154; and that of Gungaram Viswunath, *v.* Tappee Baee, ibid. page 372, and of Tooljaram Hurjeevun, *v.* Humbheram and another, ibid. p. 380; also App. Elem. Hin. Law, p. 9 *et passim*, and p. 405 *et seq.* M. The question of bequest of estates tail male and to donees not in existence has been discussed and settled in the recent case of Gyanendro Mohun Tagore, *v.* Joteindro Mohun Tagore. 4, B. L. R. O. C., p. 103 and 9, B. L. R., p. 377, 18, W. R., p. 359. G.

Rules regarding the execution, attestation, revocation, interpretation, &c. of Hindu wills have been provided for by Act XXI. of 1870. G.

gift can only be held valid under the same circumstances as those under which an ordinary gift would be considered valid. What may not be done *inter vivos*, may not be done by will. Of this description is the unequal distribution of ancestral real property. There are certain acts prohibited by the law, which, however, if carried into effect, cannot, according to the law of Bengal, be set aside, and which, though immoral, and (in one sense of the word) illegal, cannot be held to be invalid. For instance, a father, though declared to have absolute power over property acquired by himself, is prohibited from making an unequal distribution of such property among his sons, by preferring one or excluding another without sufficient cause. This has been declared in the *Dáyabhága* to be a precept, not a positive law; and it is therein laid down, that a gift or transfer under such circumstances is not null; "for a fact cannot be altered by a hundred texts." There is nothing inconsistent in this, as the doctrine is rather confirmatory of the texts which declare the absolute nature of the father's power over such property; but it has been held to extend to the legalizing of an unequal distribution of ancestral real property, and thereby interpreted in direct opposition to a positive law, which declares the ownership of the father and the son to be equal with respect to this description of property. But it cannot legitimately bear such a construction. It cannot be held to nullify an existing law, though it may be construed as declaring a precept inoperative with reference to the power expressly conferred by the law, or, in other words, to

Doctrine of "*factum valet*" noticed.

To what cases applicable.

signify that an act may be legally right, though morally objectionable. Thus a coparcener is prohibited from disposing of his own share of joint ancestral property; and such an act, where the doctrine of the *Mitácshará* prevails, (which does not recognize any several right until after partition, or the principle of *factum valet*,) would undoubtedly be both illegal and invalid. But according to the *Dáyabhága*, which recognizes this principle, and also a several though unascertained right in each coparcener, even before partition, a sale or other transfer under such circumstances would be valid and binding, as far as concerned the share of the transferring party. In the case of Bhowaneepershad Goh, *versus* Musst. Taramunee, it was determined by the Sudder Dewanny Adawlut, that according to the Hindu law as current in Bengal, a coparcener may dispose of, by gift or otherwise, his own undivided share of the ancestral landed property, notwithstanding he may have a daughter and a daughter's son living;* while in the case of Nundram and others, it was determined that, according to the law as current in Behar, a gift of joint undivided property, whether real or personal, is not valid, even to the extent of the donor's own share.† I am aware

* Sudder Dewanny Adawlut Reports, vol. iii., page 138, new ed. p. 184. The same doctrine was held in the case of Ramkunhai Rai and others, v. Bung Chund Bunhoojea, ibid. p. 17, new ed. p. 22, and the subject is more fully discussed by Mr. Colebrooke, in a note to vol. i., pp. 47 and 117.

† Case of Nundram and others, v. Kashee Pande and others, Sudder Dewanny Adawlut Reports, vol. iii., page 232, new ed. p. 310. The same

that cases have been decided in opposition to the doctrine for which I here contend. These I propose briefly to notice. The first on record is that of Rasiklal Dutt and Hurnaul Dutt, executors of the will of Madanmohun Dutt, *versus* Cheytunchurn Dutt, cited by Sir Thomas Strange, in his Elements of Hindu Law.* He states, that the case was decided about the year 1789; that the testator, a Hindu, the father of four sons, and possessed of property of both descriptions, ancestral and self-acquired, having provided for his eldest by appointment, and advanced to the three younger ones in his life the means of their establishment, thought proper to leave the whole of what he possessed to the two younger ones, to the disherison of the two elder, of whom the second disputed the will: that on reference to the pundits of the court, they affirmed the validity of the will, their answers being short; and that Sir W. Jones and Sir Robert Chambers concurred in this determination. The author of the elements adds: "The ground with the Pundits probably was (the Bengal maxim), that, however inconsistent the act with the ordinary rules of inheritance and the legal pretensions of the parties, *being done*, its validity was unquestionable." To this it can only be answered, that the motives which actuated the Pundits in their exposition of the law, and the judges in their decision, are avowedly stated on conjecture only; and that if such motives are allowed to

Cases cited involving the doctrine of wills and unequal distributions.

doctrine was held in the case of Ooman Dutt, *v.* Kunhia Singh, ibid p. 144, new ed. p. 192.

* Vol. i., page 262.

operate, there must be an end to all law, the maxim of *factum valet* superseding every doctrine and legalizing every act. The particulars of the case not having been stated, it cannot with safety be relied on as a precedent.

The second case is that of Eshanchund Rai, *versus* Eshorchund Rai, decided in the Sudder Dewanny Adawlut on the 23rd of February 1792.* In that case it was held, that a gift, in the nature of a will, made by the *zemindar* of Nuddea, settling the whole of his *zemindaree* on the eldest of his four sons, subject to a pecuniary provision for the younger ones, was good. The Pundits are stated to have assigned six reasons for this opinion, not one of which, except the last, appears entitled to any weight. The last reason assigned, namely, that a principality may lawfully and properly be given to an eldest son, is doubtless correct, and taking a *zemindaree* in the light of a principality, is applicable, and would alone have sufficed to legalize the transaction. A principality has indeed been enumerated among things impartible. But with respect to the other reasons assigned, they may be briefly replied to as follows. To the first, that, "According to law, a present made by a father to his son, through affection, shall not be shared by the brethren," it may be objected, that this relates to property other than ancestral, over which the father is expressly declared to have control. To the second, "That what has been acquired by any of the enu-

* Sudder Dewanny Adawlut Reports, vol. i., page 2.

merated lawful means, among which inheritance is one, is a fit subject of gift," that this supposes an acquisition in which no other person is entitled to participate, and not the case of an ancestral estate, in which the right of the father and son has been declared equal. To the third, "That a co-heir may dispose of his own share of undivided property," that his right to do so is admitted; but this does not include his right to alienate the shares of others. To the fourth, "That although a father be forbidden to give away lands, yet if he nevertheless do so, he merely sins, and the gift holds good," that the precept extends only to property over which the father has absolute authority, and cannot affect the law, which expressly declares him to have no greater interest than his son in the ancestral estate. And to the fifth, "That *Roghunandana* in the *Dáyatatwa*, restricting a father from giving lands to one of his sons, but clothes and ornaments only, is at variance with *Jimutavahana*, whose doctrine he espouses, and who only says that a father acts blameably in so doing," that no such variance in reality exists. In addition to the above, it may be stated, that the suit in question was brought by an uncle against his nephew, to recover a portion of an estate which had previously devolved entire on the brother of the claimant, and which, it appeared, had never been divided.*

The third case is that of Ramkoomar Neaee Bachesputtee, *versus* Kishenkinker Turk Bhoosun, decided by the Sudder Dewanny Adawlut on the 24th of

* See Appendix Elem. Hin. Law, page 437.

November 1812.* In that case it was maintained, that the gift by a father of the whole ancestral estate to one son, to the prejudice of the rest, or even to a stranger, is a valid act, (although an immoral one,) according to the doctrine received in Bengal. To refute the opinion declared by the Pundits on that occasion, it is merely necessary to state the authorities quoted by them, which would have been more applicable to the maintenance of the opposite doctrine. The following were the authorities cited in support of the above opinion. 1st. The text of *Vishnu* cited in the *Dáyabhága* : "When a father separates his sons from himself, his will regulates the division of his own acquired wealth." 2d. A quotation also from the *Dáyabhága* : "The father has ownership in gems, pearls, and other moveables, though inherited from the grandfather, and not recovered by him, just as in his own acquisitions ; and has power to distribute them unequally ; as *Yájnyawalcya* intimates : 'The father is master of the gems, pearls and corals, and of all (other moveable property) ; but neither the father nor the grandfather is so of the whole immoveable state.' Since the grandfather is here mentioned, the text must relate to his effects. By again saying, "all" after specifying 'gems, pearls,' &c. it is shown, that the father has authority to make a gift or any similar disposition of all effects, other than land, &c. but not of immoveables, a corrody, and chattels, (i. e. slaves ;) since here also it is said 'the whole,' this prohibition forbids the gift or other alienation of the

* Suddor Dewanny Adawlut Reports, vol. ii., page 42, new ed. p. 52.

whole, because (immoveable and similar possessions are) means of supporting the family. For the maintenance of the family is an indispensable obligation, as *Menu* positively declares : 'The support of persons who should be maintained, is the approved means of attaining heaven : but hell is the man's portion, if they suffer.' Therefore (let a master of a family) carefully maintain them. The prohibition is not against a donation or other transfer of a small part, not incompatible with the support of the family : for the insertion of the word 'whole' would be unmeaning, (if the gift of even a small part were forbidden.) The text of *Yájnyawalcya* cited in the *Prayushchitta-vivek:* "From the non-performance of acts which are enjoined, from the commission of acts which are declared to be criminal, and from not exercising a control over the passions, a man incurs punishment in the next world." An examination of the authorities above quoted, as given by the law officers in the case in question, will make it evident that they are totally insufficient for the support of the doctrine to which they were intended to apply.

The fourth case is that of Sham Singh, *versus* Musst. Umraotee, decided in the Sudder Dewanny Adawlut on the 28th of July 1813,* on which occasion it was determined, that, by the Hindu law as current in Mithilá, a father cannot give away the whole ancestral property to one son to the exclusion of his other sons. The author of the Considerations on Hindu Law, commenting on this decision, infers that the Sudder

* Sudder Dewanny Adawlut Reports, vol. ii., page 74, new ed. p. 92.

Dewanny Adawlut would not have entertained any doubt as to the validity of the gift, had it depended upon the law as current in Bengal; but there seems to be no other ground for this inference than the erroneous doctrines laid down in the two previously cited cases, together with the fact of the parties having disputed as to which law should govern the decision.

The fifth case is that of Bhowannychurn Bunhoojea, *versus* the Heirs of Ramkaunt Bunhoojea, which was decided in the Sudder Dewanny Adawlut on the 27th of December 1816,* and in which case it was ruled, that an unequal distribution made by a father among his sons of ancestral immoveable property is illegal and invalid, as is also the unequal distribution of property acquired by the father, and of moveable ancestral property, if made under the influence of a motive which is held in law to deprive a person of the power to make a distribution. The question as to the father's power was thoroughly investigated on this occasion. There being a difference of opinion between the Pundits attached to the Sudder Dewanny Adawlut, the following question was proposed to the Pundits of the Supreme Court, Tarapershad and Mrityoonjyee, to Nurahurree, Pundit of the Calcutta Provincial Court, and Ramajya, a Pundit attached to the College of Fort William: "A person whose elder son is alive, makes a gift to his younger, of all his property, moveable and immoveable, ancestral and acquired. Is such a gift valid, according to the law authorities current in

* Sudder Dewanny Adawlut Reports, vol. ii., page 202, new ed. p. 259.

Bengal, or not ? and if it be invalid, is it to be set aside ?"

The following answer, under the signatures of the four Pundits above-mentioned, was received to this reference :—"If a father, whose elder son is alive, make a gift to his younger, of all his acquired property, moveable and immoveable, and of all the ancestral moveable property, the gift is valid, but the doner acts sinfully. If during the life-time of an elder son, he make a gift to his younger, of all the ancestral immoveable property, such gift is not valid. Hence, if it have been made, it must be set aside. The learned have agreed that it must be set aside, because such a gift is a *fortiori* invalid ; inasmuch as he (the father) cannot even make an unequal distribution among his sons of ancestral immoveable property ; as he is not master of all ; as he is required by law, even against his own will, to make a distribution among his sons of ancestral property not acquired by himself (i. e. not recovered) ; as he is incompetent to distribute such property among his sons until the mother's courses have ceased, lest a son subsequently born should be deprived of his share ; and as, while he has children living, he has no authority over the ancestral property.

"Authorities in support of the above opinions.

1st. *Vishnu*, cited in the *Dáyabhága* :—" His will regulates the division of his own acquired wealth."
2d. *Yájnyawalcya*, cited in the *Dáyabhága* :—"The father is master of the gems, pearls, corals and of all

other moveable property." 3d. *Dáyabhága*:—"The father has ownership in gems, pearls, and other moveables, though inherited from the grandfather, and not recovered by him, just as in his own acquisitions." 4th. *Dáyabhága*:—"But not so, if it were immoveable property inherited from the grandfather, because they have an equal right to it. The father has not in such case an unlimited discretion. Unlimited discretion is interpreted by *Srierishna Tarcalancara* to signify a competency of disposal at pleasure. 5th. *Dáyabhága*:—"Since the circumstance of the father being lord of all the wealth is stated as a reason, and that cannot be in regard to the grandfather's estate, an unequal distribution made by the father is lawful only in the instance of his own acquired wealth." Commentary of *Sricrishna* on the above texts:—"Although the father be in truth lord of all the wealth inherited from ancestors, still the right here meant is not merely ownership, but competency for disposing of the wealth at pleasure; and the father has not such full dominion over property ancestral." 6th. *Dáyabhága*:—"If the father recover paternal wealth seized by strangers, and not recovered by other sharers, nor by his own father, he shall not, unless willing, share it with his sons; for in fact it was acquired by him." In this passage, *Menu* and *Vishnu* declaring that "he shall not, unless willing, share it, because it was acquired by himself," seem thereby to intimate a partition amongst sons, even against the father's will, in the case of hereditary wealth not acquired (that is, recovered) by him. 7th. *Dáyabhága*:—

"When the mother is past child-bearing," regards wealth inherited from the paternal grandfather. Since other children cannot be borne by her when her courses have ceased, partition among sons may then take place; still, however, by the choice of the father. But if the hereditary estate were divided while she continued to be capable of bearing children, those born subsequently would be deprived of subsistence: neither would that be right; for a text expresses: "They who are born, and they who are yet unbegotten, and they who are actually in the womb, all require the means of support; and the dissipation of their hereditary maintenance is ensured." *Sricrishna* has interpreted "the dissipation of hereditary maintenance" to signify, the being deprived of a share in the ancestral wealth. 8th. *Dwaitanirnaya*:—"If there be offspring, the parents have no authority over the ancestral wealth; and from the declaration of their having no authority, any unauthorized act committed by them is invalid." 9th. Text of *Vijnyaneshwara*, cited in the *Medhatithi*:—"Let the judge declare void a sale without ownership, and a gift or pledge unauthorized by the owner." The term "without ownership," intends incompetency of disposal at pleasure. 10th. Text of *Nareda*:—"That act which is done by an infant, or by any person not possessing authority, must be considered as not done. The learned in the law have so declared."

I have given the above opinion, together with the authorities cited in its support, at full length, from its being apparently the most satisfactory doctrine

hitherto recorded on the subject. By declaring void any illegal alienation of the ancestral real property, it preserves the law from the imputation of being a dead letter, and protects the son from being deprived by the caprice of the father, of that in which the law has repeatedly and expressly declared them both to have equal ownership. The case of Ramkaunt is the latest reported decision by the Sudder Dewanny Adawlut connected with the point in question. Various cases have been cited by the author of the "Considerations,"* in which wills made by Hindus have been upheld by the Supreme Court, though at variance with the doctrine above laid down. The will of Rajah Nobkishen, who, although he had a begotten and an adopted son, left an ancestral *talook* to the sons of his brother, is perhaps the most remarkable of the cases cited; but in this, as well as in most of the others, the point of law was never touched upon, the parties having joined issue on questions of fact. Upon the whole, I conclude that the text of the *Dáyabhága*, which is the groundwork of all the doubts and perplexity that have been raised on this question, can merely be held to confer a legal power of alienating property, where such power is not expressly taken away by some other text. Thus in Bengal, a man may make an unequal distribution among his sons of his personally acquired property, or of the ancestral moveable property; because, though it has been enjoined† to a father not to distinguish one son at a

Ancestral real property cannot be alienated at pleasure.

* See the chapter on Wills, page 316 *et passim.*

† *Catyáyana*, cited in Dig., vol. ii., page 540.

partition made in his life-time, nor on any account to exclude one from participation without sufficient cause, yet, as it has been declared in another place that the father is master of all moveable property, and of his own acquisitions,* the maxim that a fact cannot be altered by a hundred texts here applies to legalize a disregard of the injunction, there being texts declaratory of unlimited discretion, of equal authority with those which condemn the practice.† In other parts of India, where the maxim in question does not obtain, the injunction applies in its full force, and any prohibited alienation would be considered illegal. The subject will be resumed in the chapter treating of Partition.

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* *Yájnyawalcya*, cited in Dig., vol. ii., page 159.

† Elements of Hindu Law, vol. i., page 123, and Appendix, Chap. 1st, and see Bombay Reports, pages 154, 372, and 380, vol. i., and pages 6 and 471, vol. ii.

CHAPTER II.

OF INHERITANCE.

Of sons.

According to the Hindu law of inheritance, as it at present exists, all legitimate sons, living in a state of union with their father at the time of his death, succeed equally to his property, real and personal, ancestral and acquired. In former times, the right of primogeniture prevailed to a certain extent; but that, with other usages, has been abrogated in the present or *Cali* age.* The right of representation is also admitted, as far as the great-grandson; and the grand-

* See the case of Taliwur Singh, *versus* Puhlwan Singh, Sudder Dewanny Adawlut Reports, vol. iii., page 203, new ed. p. 402, wherein a claim of primogeniture being preferred, it was determined that priority of birth does not entitle to a larger portion. There is another decision on record (vol. ii., page 116, new ed. p. 147,) of a case in which there were sons by different wives, and one party claimed that the estate should be distributed according to the number of wives, without reference to the number of sons borne by each, (a distribution technically termed *Putnibhaga*,) averring that such had been the *Koolachar*, or immemorial usage of the family; but the Court determined that the distribution among them should be made, not with reference to the mothers, but with reference to the number of sons: being of opinion, that although, in cases of inheritance, *Koolachar*, or family usage, has the prescriptive force of law; yet, to establish *Koolachar*, it is necessary that the usage have been ancient and invariable. See also the case of Bhyroochund Rai, *versus* Russoomunee, vol. i., page 27, new ed. p. 36,

son and great-grandson, the father of the one and the father and grandfather of the other being dead, will take equal shares with their uncle and grand-uncle respectively. Indeed the term *putra* or son, has been held to signify, in its strict acceptation, a grandson and great-grandson. An adopted son is a substitute for a son of the body, where none such exists, and is entitled to the same rights and privileges. Among the sons of the *Sudra* tribe, an illegitimate son by a slave girl takes with his legitimate brothers a half share; and where there are no sons (including sons' sons and grandsons), but only the son of a daughter, he is considered as a coheir, and takes an equal share.*

Of sons' sons.

In default of sons, the grandsons inherit, in which case they take *per stirpes*, the sons, however numerous, of one son, taking no more than the sons, however few, of another son.

Of sons' grandsons.

In default of sons and grandsons, the great-grandsons inherit; in which case they also take *per stirpes*, the sons, however numerous, of one grandson, taking no more than the sons, however few, of another grandson. They will take the shares to which their respective fathers would have been entitled, had they survived.

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and the case of Sheo Buksh Singh, *versus* the Heirs of Futteh Singh, vol. ii., page 265, new ed. p. 340. See also Elem. Hin. Law, App. page 288. In the succession to principalities and large landed possessions, long established *Koolachar* will have the effect of law, and convey the property to one son to the exclusion of the rest. It has been stated by Mr. Colebrooke, in a note to the Digest, (vol. ii., page 119,) that the great possessions called *zemindarees* in official language, are considered by modern Hindu lawyers as tributary principalities.

* *Mitac.*, Chap. I., Sect. xii., §§ 1 and 2.

Of the widow.

In default of sons, grandsons, and great-grandsons in the male line, the inheritance descends lineally no farther, and the widow inherits, according to the law as current in Bengal, whether her late husband was separated, or was living as a member of an undivided family; but according to other schools, the widow succeeds to the inheritance in the former case only;* an undivided brother being held to be the next heir. If there be more than one widow, their rights are equal.† Much discussion has arisen respecting the nature of the tenure by which a widow holds property that had devolved upon her by the death of her husband; and certainly the law, in this instance, as in many others, admits of great latitude of interpretation. It is well known, that between the Bengal and the other schools, there is a difference of opinion as to the circumstances under which a widow has a right to succeed to the property of her deceased husband. By the law as current in Bengal, as has been already observed, she is entitled to succeed, whether the husband was living in a state of union with, or separation from, his brethren. By that of other schools, only where

* According to the *Mitácshará*, if a Hindu being a member of a joint family die leaving both ancestral and self-acquired property, the ancestral property goes to his copartners by right of survivorship, but the self-acquired property is inherited by the widow, there being neither community of interest nor unity of possession of the said copartners in such property, and therefore the foundation of right to take by survivorship fails. Katama Nachiar, *v.* Raja Shiva Gunga, Moore's Indian Appeals, vol. ix., p. 539, 1st June 1863. G.

† See Elem. Hin. Law, App., page 59.

the husband was separated from his brethren. So far, as to the right of succession, the law is clear and indisputable, but to what she succeeds is not so apparent. She has not an absolute proprietary right, neither can she, in strictness, be called even a tenant for life: for the law provides her successors, and restricts her use of the property to very narrow limits. She cannot dispose of the smallest part, except for necessary purposes, and certain other objects particularly specified. It follows, then, that she can be considered in no other light than as a holder in trust for certain uses; so much so, that should she make waste, they who have the reversionary interest have clearly a right to restrain her from so doing. What constitutes waste, however, must be determined by the circumstances of each individual case. The law has not defined the limits of her discretion with sufficient accuracy, and it was probably never in the contemplation of the legislator that the widow should live apart from, and out of the personal control of her husband's relations, or possess the ability to expend more than they might deem right and proper. In assigning a motive for the ordinance that a widow should succeed to her husband, and at the same time that she should be deprived of the advantages enjoyed by a tenant for life even, it seems most consistent with probability that it originated in a desire to secure, against all contingencies, a provision for the helpless widow, and thereby prevent her from having recourse to practices by which the fame and honour of the family might be tarnished. By giving her a nominal property,

she acquires consideration and respectability, and by making her the depositary of the wealth, she is guarded against the neglect or cruelty of her husband's relations. At the same time, by limiting her power, a barrier is raised against the effects of female improvidence and worldly inexperience. This opinion receives corroboration from the distinction which prevails in the Benares school, which may be said to be the fountain and source of all Hindu law. By the provisions of that code, where the brothers are united with the deceased husband, and where consequently it is fair to presume a spirit of friendship and cordiality, and there is no reason to anticipate that the widow will be treated with neglect by the brothers, she is declared to have no right of succession. It is only where the family is divided, and where there might consequently be reason to apprehend a want of brotherly feeling, that the law deems it necessary to interpose, and protect her interests. And it may be here observed, that if a man die leaving more than one widow, (three widows, for instance,) the property is considered as vesting in only one individual: thus, on the death of one or two of the widows, the survivor or survivors take the property, and no part vests in the other heirs of the husband until after the death of all the widows.

According to the doctrine of the *Smriti Chandrica*, which is of great and paramount authority in the south of India, a widow, being the mother of daughters, takes her husband's property, both moveable and immoveable, where the family is divided;

but a childless widow takes only the moveable property. Where there are two widows, one the mother of daughters and the other childless, the former alone takes the immoveable estate, and the moveable property is equally divided between them.

Of the daughter.

In default of the widow, the daughter inherits, but neither is her interest absolute. According to the doctrine of the Bengal school, the unmarried daughter is first entitled to the succession: if there be no maiden daughter, then the daughter who has, and the daughter who is likely to have male issue, are together entitled to the succession;* and on failure of either of them, the other takes the heritage. Under no circumstances can the daughters, who are either barren, or widows destitute of male issue, or the mothers of daughters only, inherit the property.

Distinction in the Benares school.

But there is a difference in the law, as it obtains in Benares, on this point, that school holding that a maiden is in the first instance entitled to the property; failing her, that the succession devolves on the married daughters who are indigent, to the exclusion of the wealthy daughters; that, in default of indigent daughters, the wealthy daughters are competent to inherit; but no preference is given to a daughter who has or is likely to have male issue, over a daughter who is barren, or a childless widow.

* A distinction is made by *Sricrishna*, in his commentary on the *Dáyabhága*, in respect of unmarried daughters. He is of opinion, that the daughter who is not betrothed is first entitled to the inheritance, and in her default the daughter who is betrothed; but this doctrine is not concurred in by any other authority, and the author of the *Dáyaruhasya* expressly impugns it as untenable.

And in the Mithilá school.

According to the law of Mithilá, an unmarried daughter is preferred to one who is married : failing her, married daughters are entitled to the inheritance; but there is no distinction made among the married daughters; and one who is married, and has or is likely to have male issue, is not preferred to one who is widowed and barren; nor is there any distinction made between indigence and wealth.

And where the family is undivided.

It may here be mentioned, that the above rule of succession is applicable to Bengal in every possible case ; but, elsewhere, only where the family is divided : for according to the doctrine of the Benares and other schools, even the widow, to whom the daughter is postponed, can never inherit, where the family is in a state of union ; nor can the mother, daughter, daughter's son, or grandmother. The father's heirs in such case exclude them. But though the schools differ on these points, they concur in opinion as to the manner in which such property devolves on the daughter's death, in default of issue male. According to the law as received in Benares and elsewhere, it does not go, as her *Stridhun*, to her husband or other heir ; and according to the law of Bengal also, it reverts to her father's heirs.* In the case of Rajchunder Das, *versus* Dhunmunee, it was determined,

* It has been asserted by the author of the Elements of Hindu Law, page 161, that property, devolved on a daughter by inheritance is classed by the southern authorities as *Stridhun*, and descends accordingly. The authority cited for this doctrine is to be found in that part of the *Mitácshará* treating of woman's peculiar property, and consequently applies to the descent of that alone. I have not been able to meet with any other.

that according to the Hindu law as current in Bengal, on the death of a widow who had claimed her husband's property, her daughter will inherit, to the exclusion of her husband's brother, if the daughter have or is likely to have male issue: and on her death without issue, her father's brother will inherit, to the exclusion of her husband.* But a curious case arose at Bombay,† involving the daughter's right, which deserves notice in this place. Of two widows, one had two sons, and the other a daughter. On the death of the latter widow, it became a question who was to succeed to her property, whether her daughter or the rival widow's sons. Various authorities were consulted, and they inclined to the opinion, that the daughter was not entitled to succeed as heir, inasmuch as property which had devolved on a widow, reverts at her death to her husband's heirs, among whom the daughter would have ranked, in default only of her own brothers.

According to the law of Bengal and Benares, the daughter's sons inherit, in default of the qualified daughters; but the right of daughters' sons is not recognized by the Mithilá school.‡ If there be sons

* Sudder Dewanny Adawlut Reports, vol. iii., page 362, new ed. p. 482.

† Elem. Hindu Law, Appendix, p. 392.

‡ The author of the *Vivada Chintamoni*, a Mithila work, has omitted the daughter's son from the series of heirs; but according to other authorities, including Mithilá legal writers, the right of a daughter's son, next to a daughter, is declared. In a claim by a daughter's son, the court held that such daughter's son is heir disregarding his omission in the said work; and that the position of a daughter's son according to the Mithilá writers, is erroneous. Surja Kumari, *versus* Gandhrap Singh, 23rd Feb. 1837. 6, Sudder Dewanny Adawlut Rep., p. 142. G.

of more than one daughter, they take *per capita*, and not as the sons' sons do *per stirpes*.* If one of several daughters, who had, as maidens, succeeded to their father's property, die leaving sons and sisters or sisters' sons, then, according to the law of Bengal, the sons alone take the share to which their mother was entitled, to the exclusion of the sisters and sisters' sons ;† and, if one of several daughters, who had, as married women, succeeded their father, die leaving

Of daughter's sons.

* The same author states, page 160, that "where such sons are numerous, when they do take, they take *per stirpes* and not *per capita*." But the reverse of this is proved by the authority cited in its favour, Dig., vol. iii., page 501. *Jagannátha* there lays down the following rule: "Again, if daughters' sons be numerous, a distribution must be made. In that case, if there be two sons of one daughter, and three of another, five equal shares must be allotted: they shall not first divide the estate in two parts, and afterwards allot one share to each son." This principle was maintained also in the case of Ramdhun Sein and others, *v.* Kishenkhanth Sein and others, it being therein determined, that grandsons by different mothers claiming their maternal grandfather's property, take *per capita*, and not *per stirpes*. Sudder Dewanny Adawlut Reports, vol. iii., p. 100, new ed. p. 133.

† Conformably to this doctrine, a case which originated in the *zillah* court of Rungpore, was decided by the Sudder Dewanny Adawlut, on the 19th of April 1820, in which it was determined, (See Reports, vol. ii., p. 26, new ed. p. 35,) that property inherited by a daughter goes at her death to her son or grandson, to the exclusion of her sister and sister's son. M. The above ruling has been followed in a recent case. Radha Kishore Manjee, *v.* Raja Ram Mundle, 4th August 1866, 6, W. R., p. 147.

These rulings however do not appear to be consistent with the general principles of the Hindu Law, as the unmarried daughter does not acquire an absolute right in the property inherited by her, and that property therefore on her death ought to go not to her heirs, but to those of her father, who in the case supposed, would be her married sisters, or sisters having male children, or in their default, the sons of her father's daughters then living, who would take *per capita*.—This

sons, sisters, or sisters' sons, according to the same law, the sisters exclude the sons; and if there be no sister, the property will be equally shared by her sons and her sisters' sons. This distinction does not seem to prevail any where but in Bengal. The author of the Considerations on Hindu Law has stated the following case :—"If there be three sisters who succeed jointly to their father's estate, A, B, and C, and supposing A to die childless, and B and C to survive her. Supposing also B to have one son, and C to have three sons, and supposing C to have died before A, and B to have survived her; it is agreed, that upon the death of A, her estate will go to B; but whether on the death of B, it shall go to her *only* son, or be divided between him and the three sons of C, is *vexata quæstio.*" In this case, I apprehend, that if the property had devolved on the daughters at the time they were maidens, then on C's death her property would go to her three sons, and not to her sisters; but if they were married at the time, it would go to her sisters; and on the death of A, to B; and on the death of B, her son and the sons of C would take *per capita*, and this upon the general principle, that property which had devolved on a daughter is taken at her death by the heirs of her father, and not by the heirs of the daughter, and the father's heirs in this case are his daughters' sons,

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subject has been discussed at great length in the 2nd volume, *Vyavashta Darpana*, p. 167.

Verse 30, Section 2, Chapter xi. of the *Dáyabhága* seems to be conclusive on the point. G.

who are entitled to equal shares.* Under no circumstances can a daughter's son's son or other descendant, or her daughter or husband, inherit immediately from her the property which devolved on her at her father's death: such property, according to the tenets of all the schools, will devolve on her father's next heir, and will not go, as her *Stridhun*, to her own heir.

In default of daughters' sons, the father inherits, according to the law as current in Bengal; but according to other schools,† the mother succeeds to the exclusion of the father.

Of the mother.

In default of the father, the mother inherits. Her interest, however, is not absolute, and is of a nature similar to that of the widow. In a case of property which had devolved on a mother by the decease of her son, the law officers of the Sudder Dewanny Adawlut held, that the rules concerning property devolving on a widow, equally affect property devolving on a mother.‡ On her death, the property devolves on the heirs of her son, and not on her heirs.

Of the brothers.

In default of father and mother, brothers inherit; first, the uterine associated brethren; next the unassociated brethren of the whole blood; thirdly, the associated brethren of the half blood; and fourthly, the unassociated brethren of the half blood. The

* *Jim. Vah.* in the *Dáyabhaga*, Chap. xi., Sec. 1, §§ 65. ii.—See Case 5, Chap. Rights of Daughters, &c., vol. ii.

† The different opinions on this point have been more fully stated in the note to Case 14, Rights of Daughters, &c., vol. ii.

‡ Case of Musst. Bijia Dibia, *v.* Unnapoorna Dibia, S. D. A. Reports, vol. i., p. 164, new ed. p. 215.

above order supposes that the deceased had only uterine or only half brothers, and that they were either all united or all separated. But if a man die, leaving an uterine brother separated, and an half brother associated or re-united, these two will inherit the property in equal shares. Sisters are not enumerated in the order of heirs.

In a case recently decided in the Sudder Dewanny Adawlut, a question arose as to the relative rights of a brother and a brother's son to succeed, on the death of a widow, to property which had devolved on her at the death of her husband, they being the next heirs. The Pundits at first declared, that a brother's son (his father being dead) was entitled to inherit together with the brother. But this opinion was subsequently proved and admitted to be erroneous. In the succession to the estate of a grandfather, the right of representation unquestionably exists; that is to say, the son of a deceased son inherits together with his uncle: not so in the case of property left by a brother, the brother's son being enumerated in the order of heirs to a childless person's estate after the brother, and entitled to succeed only in default of the latter. In the case in question, the deceased left two brothers and a widow, and the widow succeeding, one of the brothers died during the time she held possession. The son of the brother who so died claimed, on the death of the widow, to inherit together with his uncle, and the fallacy of the opinion which maintained the justice of his claim consisted in supposing, that on the death of the first brother the right of inheri-

tance of his other two surviving brothers immediately accrued, and that the dormant right of the brother who died secondly was transmitted to his son. But, in point of fact, while the widow survived, neither brother had even an inchoate right to inherit the property, and consequently the brother who died during her life-time could not have transmitted to his son a right which never appertained to himself.*

Of the brothers' sons.

In default of brothers, their sons inherit in the same order; but in regard to their succession, there is this peculiarity, that if a brother's sons, whose father died previously to the devolution of the property, claim by right of representation, they take *per stripes* with their uncle, being in that case grandsons inheriting with a son; but when the succession devolves on the brothers' sons alone as nephews, they take *per capita* as daughters' sons do. In the *Subodhini* it is stated, that the succession cannot, under any circumstances, take place *per capita*, but this opinion is overruled. He maintains also, that daughters of brothers inherit. In this opinion he is joined by *Nanda Pandita*, but the doctrine is elsewhere universally rejected.†

And grandsons.

If default of brothers' sons, their grandsons inherit in the same order, and in the same manner,‡ accord-

* Case of Rooderchunder Chowdhry, *v.* Sumbhoo Chunder Chowdhry, Sudder Dewanny Adawlut Reports, vol. iii., page 106, new ed. p 142. The same doctrine was maintained in the case of Musst. Jymunee Dibia, *versus* Ramjoy Chowdhry. Ibid. p. 289, new ed. p 385.

† See note to *Mitácshará*, page 359.

‡ It may here be observed, however, that no re-union after separation can take place with a grandson's brother. Re-union can take place only

Distinction.

ing to the law as current in Bengal; but the law of Benares, Mithilá, and other provinces, does not enumerate the brother's grandson in the order of heirs, and assigns to the paternal grandmother the place next to the brother's son.*

Thus far, with the exceptions above noticed, the several schools concur as to the order of inheritance; but they differ more considerably with respect to the remoter heirs, as will be noticed hereafter.

Of sisters' sons.

In default of brothers' grandsons, sisters' sons inherit, according to the law of Bengal; but according to other schools, the paternal grandmother, as above stated, is ranked next to the brother's son, and the sister's son also is excluded from the enumerated heirs. This point of law was established in a case decided by the Sudder Dewanny Adawlut, in which the suit being for the landed estate of a deceased Hindu, situated in Bengal, by the son of his sister against the son of his paternal uncle, it was ruled, that according to the law

with the three following relations; the father, the brother, and the paternal uncle. *Vrihaspati*, cited in the *Dáyabhága*, Chap. xi., Sec. 1, §§ 30. M.

* According to the general principles of Hindu law as laid down in the various works on the subject including the *Mitácshará* which is the highest authority in all the Schools other than that of Bengal, the brother's grandson being a nearer *Sapinda* inherits in preference to the paternal grandmother. The enumeration of heirs in the *Mitácshará* is not exhaustive but merely illustrative. Vide Amrit Kumaree Dabee, *v.* Lukhy Narain Chuckerbutty, 2, B. L. Rep., F. B., p. 28. Giree Dharee Lall Roy, *v.* The Government of Bengal, 1, B. L. Rep., P. C., p 44. According to the law as current in Mithilá claimants to inheritance as far as the seventh and even the fourteenth in descent in the male line from a common ancestor are preferable to the cousin on the mother's side of the deceased proprietor. Gunga Dutt Jha, 2, Sudder Dewanny Adawlut

of Bengal, the plaintiff would be heir, but according to the law of Mithilá the defendant.*

There is a difference of opinion among different writers of the Bengal school as to the whole and half blood; some maintaining that an uterine sister's son excludes the son of a sister of the half blood: but according to the most approved authorities, there should be no distinction. A sister's daughter is no where enumerated in the order of heirs.†

Of the other heirs according to the *Dáyacramasangraha.*

In default of sisters' sons, the inheritance is thus continued, agreeably to the doctrine of the Bengal school, as laid down in the *Dáyacramasangraha.* Brother's daughter's son—Paternal grandfather—Paternal grandmother—Paternal uncle, his son and grandson—Paternal grandfather's daughter's son—Paternal uncle's daughter's son—Paternal great-grandfather—Paternal great-grandmother—Paternal

Rep., p. 13. Rutchyputty Dutt Jha, 2, M. I., App., p 132. The great-grandson of the great-great-grandfather of the deceased is, according to the *Mitácshará*, a nearer heir than his father's sister's son. Thakur Jibnath Singh, 5, B. L. Rep., p. 442. With the above case the reader would do well to compare the contemporaneous decision of the Privy Council in Bhya Ram Singh, 28th June 1870. 5, B. L. Rep., p. 293. In this case, which was an appeal from the Sudder Court of Agra, their Lordships held that the great-great-great-grandson of the great-great-great-grandfather was entitled under the *Mitácshará* to succeed as one of the gentiles or *gotraja*, and they referred to the case of Rutchyputty Dutt Jha. G.

* Case of Rajchunder Narain, *v.* Goculchunder Goh, S. D. A. Reports, vol. i., page 43, new ed. p 56. See also Case 6, page 125, vol. ii.

† *Nanda Pandita* and *Balambhatta* maintain, that the daughters also of sisters have a right of inheritance, but their opinion is universally rejected on this point. See note to *Mitácshará*, page 348. See also a case reported in Appendix, Elem. Hindu Law, page 249.

grandfather's brother, his son and grandson—Paternal great-grandfather's daughter's son, and his brother's daughter's son. On failure of all these, the inheritance goes in the maternal line to the maternal grandfather ;* the maternal uncle ; his son and grandson, and daughter's son ; the maternal great-grandfather, his son, grandson, great-grandson, and daughter's son ; and to the maternal great-great-grandfather, his son, grandson, great-grandson, and daughter's son. In default of all these, the property goes to the remote kindred in the descending and ascending line, as far as the fourteenth in degree ; then to the spiritual preceptor ; the pupil ; the fellow student ;† those bearing the same family name ; those descended from the same patriarch ; Brahmins learned in the *Vedas ;* and lastly, to the king, to whom, however, the property of a Brahmin can never escheat, but must be distributed among other Brahmins.‡

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* It has been remarked by *Jagannátha*, (page 530, vol. iii.) "That the son of a son's and of a grandson's daughter, and the son of a brother's and of a nephew's daughter, and so forth, claim succession in the order of proximity, before the maternal grandfather ;" but this opinion does not seem to be supported by any authority.

† See a Bombay case cited in Elem. Hindu Law, Appendix, page 257, in which it was determined, that a fellow hermit is heir to an anchoret ; his pupil to an ascetic ; and his preceptor to a professed student of theology. M.

‡ This question was discussed by the Privy Council in case of Collector of Muslipatam, *v.* Cavaly Vencata Narainapah, 30th July 1860, Suth. P. C. Judg., p. 417, in which it is held that on the death of a Brahmin without heirs, the sovereign power in British India is entitled to take his estate by escheat, subject however to the trusts and charges previously

The above order of succession, however, is by no means universally adhered to, even among the writers of the Bengal school. After the sister's son, *Sricrishna Tarcalancara*, in his commentary on the *Dáyabhága*, places the paternal uncle of the whole blood; the paternal uncle of the half blood; the son of the paternal uncle of the whole blood; the son of the paternal uncle of the half blood; their grandsons successively; the paternal grandfather's daughter's son; the paternal grandfather; the paternal grandmother; the paternal grandfather's uterine brother; his half brother; their sons and grandsons successively; the paternal great-grandfather's daughter's son; the *Sapindas;* the maternal uncle and the rest, who present oblations which the deceased was bound to offer; the mother's sister's son; the maternal uncle's sons and grandsons; the grandson of the son's son, and other descendants for three generations in succession; the offspring of the paternal grandfather's grandfather, and other ancestors for three generations; the *Samanodacas;* and lastly, the spiritual teacher, &c., &c.

According to *Sricrishna.*

The series of heirs is thus stated by the compilers of the *Vivadarnavasetu* and *Vivadabhangarnava.** And according to other authorities.

affecting the estate. This question was also discussed by the Agra High Court in the case of the Collector of Moradabad, *v.* Mussummut Durga, 28th August 1868, and on the authority of the above Privy Council decision it was held "that the title of Government by escheat, even to the property of a Brahmin ought to prevail against any claimant who cannot show a better title." Report of the Legal Remem., North Western Provinces, for 1868-69, page 17. G.

* Among modern digests, the most remarkable are the *Vivádarnavasetu*, compiled by order of Mr. Hastings; *Vivadasarárnava*, compiled

After the sister's son, the grandfather, next the grandmother ; and afterwards the enumeration proceeds as follows. Uncle—uncle's son—grandson, and great-grandson—Grandfather's daughter's son—Great-grandfather—Great-grandmother—Their son, grandson, great-grandson, and daughter's son—Maternal grandfather—Maternal uncle, his son and grandson —The deceased's grandson's grandson (in the male line), his great-grandson, and his great-great-grandson. Then the ascending line succeed, namely, the paternal great-grandfather's father, his son, grandson, and great-grandson.*

The above cited four authorities are of the greatest weight in the province of Bengal ; and where they differ, reliance may with safety be placed on the *Dayacramasangraha* of *Sricrishna*†. It will be observed, however, that all these authorities concur in the order of enumeration as far as the sister's son, which perhaps is all that will be requisite for practical purposes ; and it would be but a waste of time to enter into any disquisition as to the differences of opinion entertained by writers of inferior importance.

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at the request of Sir William Jones ; and the *Vivádabhangarnava*, by *Jagannátha*.—Colebrooke's Preface to Digest, page 23.

* *Jagannatha* so far differs from the series here given, that he assigns a place next to the maternal uncle's grandson to the maternal great-grandfather and the maternal great-great-grandfather and their descendants. He also is of opinion, that of the male descendants of the paternal grandfather and great-grandfather, those related by the whole blood should exclude those of the half blood.

† See the opinion of Mr. Colebrooke, cited in Elem. Hindu Law, Appendix, p. 261.

Order of succession according to the Benares school.

According to the law as current in Benares, in default of the son, and son's son and grandson, the widow (supposing the husband's estate to have been distinct and separate) succeeds to the property under the limited tenure above specified. But if her husband's estate was joint, and held in coparcenary, she is only entitled to maintenance.

In default of the widow, the maiden daughter inherits. In her default, the married indigent daughter. In her default, the married wealthy daughter. Then the daughter's son, but the *Vivadachandra*, the *Vivádaratnacara*, and *Vivádachintamani*, authorities which are current in Mithilá, do not enumerate the daughter's son among the series of heirs.* The mother ranks next in the order of succession,†

* According to the commentary of *Balambhatta*, the daughter's daughter inherits, in default of the daughter's son; but this is not the received opinion: and in a case decided by the Court of Sudder Dewanny Adawlut, according to the law of Bengal, (Sudder Dewanny Adawlut Reports, vol. ii., p. 290, new ed. p. 372,) it was determined, where two or four daughters died during the life-time of their mother, and one of them left a daughter, which daughter sued her aunts for a fourth of the property in right of her mother, that there was no legal foundation for the claim. M. The author of the *Vivádá Chintamani*, a Mithilá work, has omitted the daughter's son from the series of heirs; but according to other authorities, including Mithilá legal writers, the right of a daughter's son, next to a daughter, is declared. In a claim by a daughter's son, the Court held that such daughter's son is heir, disregarding his omission in the said work; and thus ruling that the position in the *Dáya Crama Sangraha*, that a daughter's son, according to the Mithilá writers, is not an heir, is erroneous. Surja Kumari, *v.* Gandhrap Singh, 23rd Feb. 1837. 6, Sel. Rep., p. 142. G.

† The same commentator says, the father should inherit first, and then the mother. *Nanda Pandita*, the author of a commentary on the *Mitác-*

and after her the father. In default of him, brothers of the whole blood succeed; and in their default, those of the half blood.*

In their default, their sons inherit successively;† then the paternal grandmother;‡ next the paternal grandfather; the paternal uncle of the whole blood; of the half blood; their sons successively; the paternal great-grandmother;§ the paternal grandfather, his son and grandson, successively; the paternal great-grandfather's mother;‖ his father, his brother, his

shará, concurs in the opinion of *Balambhatta*. *Apararca*, another commentator, *Camalacara*, the author of the *Vivádatandava*, the authors of the *Smritichandricá*, *Madana Rutna*, *Vyavahâramayuc'ha*, *Vivádachandrica*, *Rutnácara*, and other authorities current in Benares, give the father the preference over the mother, and *Jimutavahana*, *Raghunandana*, and all other Bengal authorities adopt this doctrine; but all the other Benares authorities follow the text of the *Mitácshará*, which assigns the preference to the mother, while *Scricara* maintains that the father and mother inherit together.

* *Balambhatta* is of opinion, that brothers and sisters should inherit together; but this doctrine is not received. M. According to the law of inheritance prevailing in Bombay, sisters succeed to the estate of their deceased brother. Venayêck Anundrow, *v.* Luxom Baee. 9, M. I., App., p. 516. A sister cannot inherit (except in Bombay) as heir to her brother. Ramdyal Deb, *v.* Magnee. 28th Nov. 1864. 1, W. R., p 227, Guman Kumari, *v.* Srikant Neogee. 2, Sevestre H. C. Rep., p 460. G.

† And, according to *Balambhatta*, brothers' daughters, and brothers' sons inherit together; but neither is this opinion followed.

‡ *Sricara Acharjya* maintains, that the brothers' grandsons have a title to the succession in default of the brothers' sons; and this opinion is also held by the author of the *Vivádachandrica*, but by no other authority; and there is the same difference of opinion, as to the relative priority of the grandmother, as has been noticed in the case of the father and mother.

§ The same difference of opinion exists in this case also.

‖ And in this case.

brother's son. In default of all these, the *Sapindas* in the same order as far as the seventh in degree, which includes only one grade higher in the order of ascent than the heirs above enumerated. In default of *Sapindas*, the *Samanodacas* succeed; and these include the above enumerated heirs in the same order as far as the fourteenth in degree.* In default of the *Samanodacas*, the *Bundhoos* or cognates succeed. These kindred are of three descriptions; personal, paternal, and maternal. The personal kindred are, the sons of his own father's sister; the sons of his own mother's sister,† and the sons of his own maternal uncle. The paternal kindred are, the sons of his father's paternal aunt, the sons of his father's maternal aunt, and the sons of his father's maternal uncle. His maternal kindred are, the sons of his mother's paternal aunt, the sons of his mother's maternal aunt, and the sons of his mother's maternal uncle.‡ In

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* The term *Gotraja* (or gentiles) has been defined to signify *Sapindas* and *Samanodacas* by *Balambhatta*, and in the *Subodhini*, &c. M.

† According to the *Mitácshará* the sister's son is entitled to inherit as a *Bandhu*. Amrit Kumari Dabee, *v.* Lukhynarain Chuckerbutty. 12th Sept. 1868, 2, B. L. Rep., F. B., p. 28. G.

‡ See *Mitácshará*, page 352. In this series, no provision appears to have been made for the maternal relations in the ascending line; but *Vachespatimisra* in the *Vivádachintamani*, assigns to "the maternal uncle and the rest," (*Matooladi*,) a place in the order of succession next to the *Samanodacas*; and *Mitramisra*, in the *Veeramitrodaya*, expresses his opinion, that as the maternal uncle's son inherits, he himself should be held to have the same right by analogy. M. The enumeration of *Bandhus*, or cognate kindred, given in the *Mitácshará*, Ch. ii., Sec. 6, Art. i. is not exhaustive. The maternal uncle and the father's maternal

default of them, the *Acharjya* or spiritual preceptor, the pupil, fellow student in theology, learned Brahmins; and lastly, always excepting the property of Brahmins, the estate escheats to the ruling power.

The order of succession as it obtains in Mithilá corresponds with what is here laid down. In the case of Gungadutt Jha, *v.* Sreenarain and Musst. Leelawutee, (Sudder Dewanny Adawlut Reports, vol. ii., page 11, new ed. p 13,) it was determined, that according to the law as current in Mithilá, claimants to inheritance, as far as the seventh (*Sapindas*) and even the fourteenth in descent (*Samanodacas*) in the male line from a common ancestor, are preferable to the cousin by the mother's side of the deceased proprietor; that is to say, his mother's sister's son. Had the case in question being decided according to the law of Bengal, (which, the parties there residing, would have so happened; had it not been determined that a person settling in a foreign district shall not be deprived of the laws of his native district, provided he adhere to its customs and usages,) the mother's sister's son would have obtained the preference; that individual ranking, agreeably to the law of Bengal, between the *Sapindas* and the *Samanodacas*, as was exemplified in the case of Roopchurn Mohapater, *v.* Anund Lal Khan, (Sudder Dewanny Adawlut Reports, vol. ii., page 35, new ed. p. 45,) in which it was determined, according to an exposition

According to other schools.

uncle will take, as heirs in preference to the Crown. Gireedhari Lall Roy, *v.* The Government of Bengal, 17th July 1868, 1, B. L. Rep., F. B., p. 44. G.

of the Hindu law as current in Bengal, that the son of a maternal uncle (who is also a *Bundhoo)* takes the inheritance in preference to lineal descendants from a common ancestor, beyond the third in ascent.

The order of succession, agreeably to the law as current in the south of India, does not appear to differ from that of Benares.

In the *Vyavahárarahasyuc'ha*, an authority of great eminence in the west of India, a considerable deviation from the above order appear; and the heirs, after the mother, are thus enumerated. The brother of the whole blood, his son, the paternal grandmother, the sister,* the paternal grandfather, and the brother of the half blood, who inherit together. In default of these, the *Sapindas*, the *Samanodacas*, and the *Bundhoos* inherit successively, according to their degree of proximity.

It may be stated, as a general principle of the law as applicable to all the schools, that he with whom rests the right of performing obsequies is entitled to preference in the order of succession; but there are exceptions to this rule; for instance, in the case of a widow dying and leaving a brother and daughter her surviving, the daughter takes to the exclusion of the

* The Bombay Reports, vol. ii., page 471, exhibit a case demonstrative of the sister's right according to this doctrine, and in a suit between two cousins for the property of their maternal uncle, it was held that neither had any right during the life-time of their uncle's sister. There is another similar case in vol. i., page 71. But this admission of the sister seems peculiar to the doctrine followed on that side of India. See Colebrooke, cited in Appendix, Elem. Hindu Law, page 252.

brother, although the exequial ceremonies must be performed by the latter.* The passages of Hindu law which intimate that the succession to the estate and the right of performing obsequies go together, do not imply that the mere act of celebrating the funeral rites gives a title to the succession; but that the successor is bound to the due performance of the last rites for the person whose wealth has devolved on him.†

* Elem. Hin. Law, App., pp. 245 and 251.

† Note to S. D. A. Reports, vol. i., p. 22, new ed. p. 29.

CHAPTER III.

OF STRIDHUN, OR WOMAN'S SEPARATE PROPERTY.

This description of property is not governed by the ordinary rules of inheritance. It is peculiar and distinct, and the succession to it varies according to circumstances. It varies according to the condition of the woman, and the means by which she became possessed of the property.*

In the *Mitácshará*, whatever a woman may have acquired, whether by inheritance, purchase, partition,

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* According to the Hindu law, there are several sorts of his species of property, some of which are as follows. *Adhyagnica*, or what was given before the nuptial fire. *Adhyabahana*, or what was given at the bridal procession. *Preetidatta*, or what was given in token of affection. *Matripitri* and *Bhratridatta*, or what was received from a mother, father, and brother. *Adhividhanica*, or a gift on a second marriage, i. e., wealth given by a man for the sake of satisfying his first wife, when desirous of espousing a second. *Parinayayung*, or *paraphernalia*. *Anwadhayica*, or gift subsequent. *Sowdayica*, or gift from affectionate kindred. *Sulca*, or perquisite. *Yautuca*, or what was received at marriage. *Padabundanica*, or what was given to the wife in return of her humble salutation. Some lawyers class the *Preetidatta* and the *Padabundanica* as one species of woman's property, under the appellation of *Lavanyarjita*, or what was gained by loveliness.

seizure, or finding, is denominated woman's property, but it does not constitute her *peculium*. Authors differ in their enumeration of the various sorts of *Stridhun*, some confining the number to eight, others to six, others to five, and others to three; but as the difference consists in a more or less comprehensive classification, it does not require any particular notice. The most comprehensive definition of a married woman's *peculium*, is given in the following text of *Menu*:—"What was given before the nuptial fire, what was given at the bridal procession, what was given in token of love, and what was received from a mother, a brother, or a father, are considered as the sixfold separate property of a married woman."* And it may be here observed, that *Stridhun* which has once devolved according to the law of succession which governs the descent of this peculiar species of property, ceases to be ranked as such, and is ever afterward governed by the ordinary rules of inheritance: for instance, property given to a woman on her marriage is *Stridhun*, and passes to her daughter, at her death; but at the daughter's death, it passes to the heir of the daughter like other property; and the brother of her mother would be heir in preference to her own daughter, such daughter being a widow without issue.

Definition of *Stridhun*, according to *Menu*.

Succession to

Where the deceased was unmarried;

To such property left by an unmarried woman, the heirs are her brother, her father, and her mother successively; and failing these, her paternal kinsmen in due order.

* §§ 365.

And where married.

To such property left by a married woman given to her at the time of her nuptials, the heirs are her daughters; the maiden, as in the ordinary law of inheritance, ranking first, and then the married daughter likely to have male issue.* The barren and the widowed daughters, failing the two first, succeed as coheirs. In default of daughters, the son succeeds; then the daughter's son,† the son's son, the great-grandson in the male line, the son of a contemporary wife, her grandson and her great-grandson in the male line. In default of all these descendants, supposing the marriage to have been celebrated according to any of the five first forms,‡ the husband succeeds, and the brother, the mother, the father. But if celebrated according to any of the three last forms,§

* It may here be mentioned, that at the death of a maiden or betrothed daughter on whom the inheritance had devolved, and who proved barren, or on the death of a widow who had not given birth to a son, the succession of the property which they had so inherited will devolve next on the sisters having and likely to have male issue; and in their default, on the barren and widowed daughters. M. Property given by a Hindu to his daughter on the occasion of her marriage, is *Stridhana*, and passes to her daughter at her death. Prankishen Singh, *v.* Bhogwatee. 25th April 1793. 1, Sel. Rep., p. 3. G.

† According to *Jimutavahana*, the right of the daughter's son is postponed to that of the son of the contemporary wife; but his opinion in this respect is refuted by *Sricrishna* and other eminent authorities

‡ For an enumeration of these forms, see the chapter of *Manu* on Marriage.

§ The justice of this order of succession does not at first sight seem obvious, at least as regards the *Asura* marriage, where money is advanced by the family of the bridegroom, and to which, therefore, it would appear equitable that it should revert on the death of the bride.

the brother is preferred to the husband, and both are postponed to the mother and father. In default of these, the heirs are successively as follows :—Husband's younger brother, his younger brother's son, his elder brother's son,* the sister's son, husband's sister's son, the brother's son, the son-in-law, the father-in-law, the elder brother-in-law, the *Sapindas*, the *Saculyas*, the *Samanodacas*.

And if given to her by her father.

To such property left by a married woman given to her by her father, but not at the time of her nuptials, the heirs are successively, a maiden daughter, a son, a daughter who has or is likely to have male issue, daughter's son, son's son, son's grandson, the great-grandson in the male line, the son of a contemporary wife, her grandson, her great-grandson in the male line. In default of all these, the barren and the widowed daughters succeed as coheirs, and then the succession goes as in the five first forms of marriage.

And if not given to her by her father.

To such property left by a married woman not given to her by her father, and not given to her at the time of her nuptials, the heirs are in the same order as above, with the exception that the son and unmarried daughter inherit together, and not succes-

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* This however is not consistent with the *Dáyabhágа*, which recites in Ch. 4, Sec. 3, para. 37, that after the husband's younger brother, "the son either of her husband's elder or of his younger brother, is heir, &c." From this, and from the reasons of the inheritance assigned it appears that the sons of both the brothers inherit together. G.

sively, and that the son's son is preferred to the daughter's son.*

It may here be observed, that the Hindu law recognizes the absolute dominion of a married woman over her separate and peculiar property, except land given to her by her husband, of which she is at liberty to make any disposition at pleasure. He has nevertheless power to use the woman's *peculium*, and consume it in case of distress; and she is subject to his control, even in regard to her separate and peculiar property.†

Power of a woman over her *Stridhun.*

* But *Raghunandana* holds, that in the case of a married woman dying without issue, the husband alone has a right to the property of his wife, bestowed on her by him after marriage; but that the brother has in such case the prior right to any property which may have been given to her by her father and mother.

† The order above given is chiefly taken from Colebrooke's translation of the *Dáyabhágu*, page 100. I do not find that the law in this particular varies materially in the different schools; except that (as in the case of succession to ordinary property) a distinction is made by the law of Benares and other schools, between wealthy and indigent daughters. There are also many other nice distinctions and discrepancies of opinion, of which the following are specimens, and which it is unimportant to notice at greater length in this place. According to *Jimutavahana* and the mass of Bengal authorities, the property of a deceased woman not received at her nuptials, and not given to her by her father, goes to her son and to her unmarried daughters in equal portions, whether the latter have been betrothed or otherwise. *Jagannátha* is of opinion, that the succession of a daughter who has been betrothed is barred by the claim of one who has not been affianced, and that both cannot have an equal right to inherit with a brother. *Raghunandana* denies that there is any text justifying the succession of a betrothed daughter. The authors of the *Vyavaháramayuc'ha*, and *Beeramitrodaya* distinctly state, that in default of a maiden daughter, a married one whose husband is living takes the inheritance with her brother. According to the *Mitácshará* and other ancient authorities current in

Benares, the brothers and sisters cannot under any circumstances inherit together; while *Madhavácháryya* states, that sons and daughters inherit their mother's *peculium* together, only where it was derived from the family of the husband; and *Bachespati Bhuttácháryya*, on the other hand, contends that they inherit simultaneously in every instance, excepting that of property received at nuptials, and given by parents. The conflicting doctrines in matters such as the above, of minor moment might be multiplied almost *ad infinitum*. M. Property given by a Hindu to his sister and paternal uncle's daughter was held to be at their entire disposal as their *Sandayica Stridhana* or peculiar property, by gift from affectionate kindred. Gossain Chand Kobraj, *v.* Kishenmonee. 8th July 1836. 6, Sel. Rep., p. 77. Semble. Property given by a Hindu who has married two wives, to his first wife, by a written instrument attested by witnesses in order to satisfy her in respect of his second marriage, is her property as *Stridhana*, and she may sue her husband for it as for debt. G. *v.* K. East's Notes, Case 129. A woman can dispose of *Stridhana* at pleasure by gift, will or sale (except immoveable property given to her by her husband.) Tincowri Chatterjee, *v.* Denonath Banerjee. 25th May 1865. 3, W. R., p. 49. According to the *Mitácshará* and the *Viváda Chintamanee*, *all* property that a woman inherits does not thereby become *Stridhana*, so as, after her death, to descend to her heirs. Punchanund Ojha, *v.* Lalshan Misser, 3, W. R., 17th July 1865, p. 140. G.

CHAPTER IV.

OF PARTITION.

Having treated of the subject of property acquired by succession, it remains to treat of that which is acquired by partition while the ancestor survives, and by partition among the heirs, after succession.

Father's consent requisite to partition in Bengal.

The father's consent is requisite to partition, and, while he lives, the sons have not, according to the law of Bengal, the power to exact it, excepting under such circumstances as would altogether divest him of his proprietary right, such as his degradation, or his adoption of a religious life. *Jagannatha* has, indeed, expressed an opinion, that sons, oppressed by a step-mother or the like, may apply to the king, and obtain a partition from their father of the patrimony inherited from the grandfather, though not a partition of wealth acquired by the father himself. To the father's right of making a partition there is but one condition annexed, namely, that the mother be past childbearing, and this condition applies to ancestral immoveable property alone; as to his self-acquired estate, whether it consists of moveable or immoveable property, and the ancestral property of whatever description which may have been usurped by a stranger, but recovered by the father, his own consent is the

Exception.

Opinion of *Jagannatha*.

Condition.

only requisite to partition. But the law as current in Benares and other schools, differs widely from that of Bengal, in respect to partition of the ancestral estate, which, according to the former, may be enforced at the pleasure of the sons, if the mother be incapable of bearing more issue, even though the father retain his worldly affections, and though he be averse to partition.*

Partition of ancestral estate demandable by sons according to the law of Benares.

How to be made by the father according to the law of Bengal.

According to the law of Bengal, the father may make an unequal distribution of property acquired by himself exclusively, as well as of moveable ancestral property, and of property of whatever description, recovered by himself, retaining in his own hands as much as he may think fit; and should the distribution he makes be unequal, or should he without just cause exclude any one of his sons, the act is valid, though sinful; not so with respect to the ancestral immoveable estate and property, to the acquisition of which his sons may have contributed: of such property the sons are entitled to equal shares; but the father may retain a double share of it, as well as of acquisitions made by his sons.

And Benares.

The law of Benares, on the other hand, prohibits any unequal distribution by the father of ancestral property of whatever description, as well as of immoveable property acquired by himself. At a distribution of his own personal acquisitions even, he cannot, according to the same law, reserve more than two shares for himself; and as the maxim of *factum valet* does not apply in that school, any unequal dis-

*Mitac., Ch. i., Sec. 2, §§ 7.

tribution of real property must be considered as not only sinful, but illegal.*

This subject has been treated of at great length by the author of the Considerations on Hindu Law, in the chapter on gifts and unequal distribution: and though he confesses it to be one of a most perplexing nature, from the variety of opposite decisions to which it has given rise, yet he inclines to the opinion, that a gift of even the entire ancestral immoveable property to one son, to the exclusion of the rest, is sinful, but nevertheless *valid*, if made. It must be recollected, that he was treating of the law as current in Bengal only, and not elsewhere. My reasons for arriving at an opposite opinion are; first, because the doctrine for which I contend has been established by the latest decision, founded on a more minute and deliberate investigation of the law of the case than had ever before been made; and secondly, because the only authority for the reverse of this doctrine consists in the following passages from the *Dáyabhága*:—"The texts of *Vyasa* exhibiting a prohibition are intended to show a moral offence; they are not meant to invalidate the sale or other transfer. Therefore, since it is denied that a gift or sale should be made, the precept is infringed by making one; but the gift or transfer is not null, for a fact cannot be altered by a hundred

* Though as the father is not precluded from disposing of moveables at his discretion, a *gift* of such property to one son should not be deemed invalid. Colebrooke, cited in Elem. Hin. Law, App., p. 5; and as to the father's incompetency to dispose of immoveable property, though acquired by himself, see Ibid, p. 7.

Argument against unequal partition in certain cases.

texts." Now if these passages are to be taken in a general sense; if they are to be held to have the effect of legalizing or at least rendering valid all acts committed in direct opposition to the law, they must have the effect of superseding all law; and it would be better at once to pronounce those texts alone to be the guide for our judicial decisions. The example adduced by the commentator to illustrate these texts, clearly shows the spirit in which this unmeaning, though mischievous dogma was delivered; he declares, that a fact cannot be altered by a hundred texts, in the same manner as the murder of a Brahmin, though in the highest degree criminal and unlawful, having been perpetrated, there is no remedy, or in other words, that the defunct Brahmin cannot be brought to life again. The illustration might be apposite, if there were no such thing as retribution, and if the law did not exact all possible amends for the injury inflicted. But what renders this conclusion less disputable is, that the texts of *Vyasa* in question occur in the chapter of the *Dáyabkága* which treats of self-acquisitions, and has no reference to ancestral property. If any additional proof be wanting of the father's incompetency to dispose of ancestral real property by an unequal partition, or to do any other act with respect to it which might be prejudicial to the interests of his son, I would merely refer to the provision contained in Chap. iii., Sect. 7, §§ 10, of the translation of the extract from the *Mitácshará* relative to judicial proceedings. The rule is in the following terms: "The ownership of father and son is the same

in land which was acquired by his father," &c. From this text it appears, "that in the case of land acquired by the grandfather, the ownership of father and son is equal; and therefore, if the father make away with the immoveable property so acquired by the grandfather, and if the son has recourse to a court of justice, a judicial proceeding will be entertained between the father and son." The passage occurs in a dissertation as to who are fit parties in judicial proceedings; and although the indecorum of a contest wherein the father and son are litigant parties has been expressly recognized, yet, at the same time, the rights of the son are declared to be of so inviolable a nature, that an action by him for the maintenance of them will lie against his father, and that it is better there should be a breach of moral decorum than a violation of legal right.

The question as to the extent to which an unequal distribution made by a father in the province of Bengal should be upheld, has been amply discussed also in the report of a case decided by the Court of Sudder Dewanny Adawlut in the year 1816,* wherein it was determined, that an unequal distribution of ancestral immoveable property is illegal and invalid, and that the unequal distribution of property acquired by the father, and of moveable ancestral property, is legal and valid, unless when made under the influence of a motive which is held in law to deprive a person of the power to make a distribution. It was declared, Case cited.

* For the whole of the argument, see Sudder Dewanny Adawlut Reports, vol. ii., page 214, new ed. p. 259.

in a note to that case, that the validity of an unequal distribution of ancestral immoveable property, such as is expressly forbidden by the received authorities on Hindu law, cannot be maintained on any construction of that law, by *Jimutavahana* or others. *Jagannátha*, in his Digest, maintains an opinion opposite to this, and lays it down, that if a father, infringing the law, absolutely give away the whole or part of the immoveable ancestral property, such gift is valid, provided he be not under the influence of anger or other disqualifying motive: and admitting this doctrine to be correct, it must be inferred *a fortiori* that he is authorized to make an unequal distribution of such property; but the reverse of this doctrine has been established by the mass of authorities cited in the case above alluded to.

Opinion of *Jagannátha* over-ruled.

Right of son born after partition.

In the event of a son being born after partition made by the father, he will be sole heir to the property retained by the father; and if none have been retained, the other sons are bound to contribute to a share out of their portions. According to *Jimutavahana*, *Raghunandana*, *Sricrishna*, and other Bengal authors, when partition is made by a father, a share equal to that of a son must be given to the childless wife, not to her who has male issue. But the doctrine laid down by *Harinatha* is, that if the father reserve two or more shares, no share need be assigned to the wives, because their maintenance may be supplied out of the portion reserved. It is also laid down in the *Vivadarnavasetu*, that an equal share to a wife is ordained, in a case where the father gives equal shares to his

Childless wives entitled to share according to Bengal authorities.

Opinion of *Harinátha*.

Vivádárnavasetu.

sons; but that where he gives unequal portions, and reserves a larger share for himself, he is bound to allot to each of his wives, from the property reserved by himself, as much as may amount to the average share of a son. These shares to wives are allotted only in case of no property having been given to them. According to some authorities, if a wife had received property elsewhere, a moiety of a son's share should be allotted to her; but according to other authorities, the difference should be made up to the wives between what they have received and a son's share. The doctrine maintained by *Jagannátha* is, that if the wife has received, from any quarter, wealth which would have devolved ultimately on her husband, such wealth should be included in the calculation of her allotment; but if she received the property from her own father or other relative, or from the maternal uncle or other collateral kinsman of her husband, it should not be included, her husband not having any interest therein.

Rule where the wife has received property.

The law as current in Benares, Mithilá, and elsewhere, differs from the Bengal school on this subject, and is not in itself uniform or consistent. *Vijnyaneswara* ordains: "When the father, by his own choice, makes all his sons partakers of equal portions, his wives, to whom peculiar property had not been given by their husband or father-in-law, must be made participants of shares equal to those of sons." But if separate property had been given, the same authority subsequently directs the allotment of half a share; "or if any had been given, let him assign the half." According to *Madhavacharjya*, if the father by

Doctrines of the Benares and other schools as to the shares of wives.

his own free will make his sons equal participants, he ought to make his wives, to whom no separate property has been given, partakers of a share equal to that of a son ; but if such property has been presented to her, then a moiety should be given. *Cumulacara*, the author of the *Vivádatandava*, declares generally, that whether the father be living or dead, his wives are respectively entitled to a son's portion. But *Sulapani*, in the *Dipacalica*, maintains, that if the father make an equal partition among his sons by his own choice, he must give equal shares to such of his wives only as have no male issue : and *Helayudha* also lays it down, that wives who have no sons are here intended. *Misra* contends, that "when he reserves the greater part of his fortune, and gives some trifle to his sons, or takes a double share for himself, the husband must give so much wealth to his wives out of his own share alone : accordingly, the separate delivery of shares to wives is only ordained when he makes an equal partition." The sum of the above arguments seems to be, that in the case of an equal partition made by a father among his sons, his wives who are destitute of male issue take equal portions ; that, where he reserves a large portion for himself, his wives are not entitled to any specific share, but must be maintained by him ; and that, where unequal shares are given to sons, the average of the shares of the sons should be taken for the purpose of ascertaining the allotments of the wives. The same rules apply also to paternal grandmothers, in case of partition of the ancestral property.

Sum of the arguments.

Partition when to be made by brethren.

At any time after the death, natural or civil, of their parents, the brethren are competent to come to a partition among themselves of the property, moveable and immoveable, ancestral and acquired; and, according to the law as received in the province of Bengal, the widow is not only entitled to share an undivided estate with the brethren of her husband, but she may require from them a partition of it, although her allotment will devolve on the heirs of her husband after her decease.* Partition may be made also while the mother survives. This rule, though at variance with the doctrine of *Jimutavahana*, has nevertheless been maintained by more modern authorities, and is universally observed in practice.†

Rights of nephews.

Nephews whose fathers are dead, are entitled, as far as the fourth in descent, to participate equally with the brethren. These take *per stirpes*, and any one of the co-parceners may insist on the partition of his share.‡

Of mothers and daughters.

But in all such cases, to each of the father's wives who is a mother, must be assigned a share equal to that of a son, and to the childless wives a sufficient maintenance; but according to the *Mitácshará* and

* See note to the case of Bhyroochund Rai, *v.* Russoomunee, Sudder Dewanny Adawlut Reports, vol. i., p. 28, new ed. p. 36, and case of Neelkaunt Rai, *v.* Munee Chowdrain, Ibid, p. 58, new ed. p. 77, also case of Rani Bhawani Dibia and another, *v.* Ranee Soorujmunee, Ibid, p. 135, new ed. p. 179. The reverse is the case, according to the law of Benares. See the case of Duljeet Singh, *v.* Sheomunook Singh, Ibid, p. 59, new ed. p. 79.

† Dig., vol. iii., p. 78.

‡ *Catyáyana*, cited in Dig., vol. iii., p. 7; and see Elem. Hindu Law, Appendix, p. 292.

other woks current in Benares and the southern provinces, childless wives are also entitled to shares, the term *mata* being interpreted to signify both mother and step-mother. The *Smritichandrica* is the only authority which altogether excludes a mother from the right of participation. To the unmarried daughters such portions are allotted as may suffice for the due celebration of their nuptials.* This portion has been fixed at a fourth of the share of a brother: in other words, supposing there is one son and one daughter, the estate should be made into two parts, and one of those two parts made into four. The daughter takes one of these fourths. If there be two sons and one daughter, the estate should be made into three parts, and one of these three parts made into four. The daughter takes one of these fourths, or a twelfth. If there be one son and two daughters, the estate should be made into three parts, and two of those three parts made into four. The daughters take each one of these fourths.† But according to the best authorities, these proportions are not universally assignable; for where the estate is either too small to admit of this being given without inconvenience, or too large to render the gift of such portion unnecessary to the due celebration of the nuptials, the sisters are entitled to so much only as may suffice to defray the expenses of the marriage ceremony. In fine, this provision for the sisters, intended to uphold the general respectability of the family, is accorded rather as a

Sister's interests undefined.

* Elem. Hindu Law, App., pp. 86 and 97.

† *Mitac.* on Inheritance, Chap. i., §§ 7.

matter of indulgence, than prescribed as a matter of right.*

Any improvement to joint property effected by one of the brethren, does not confer on him a title to a greater share ;† but an acquisition made by one, by means of his own unassisted and exclusive labour, entitles the acquirer, according to the law as current in Bengal, to a double share on partition. And it was ruled by the Sudder Dewanny Adawlut, that where an estate is acquired by one of four brothers living together, either with aid from joint funds, or with personal aid from the brothers, two-fifths should be given to the acquirer, and one-fifth to each of the other three.‡ But according to the law as current in Benares, the fact of one brother's having contributed personal labour while no exertion was made by the other, is not a ground of distinction. If the patrimonial stock was used, all the brethren share alike.§ If the joint stock have not been used,‖ he by whose sole

Share of the acquirer.

According to the law of Benares.

* The question has been fully discussed by the author of the Considerations on Hindu Law, page 103 *et seq.* The inconsistency of the rules has been pointed out; but the same conclusion is arrived at, namely, that the sister's is a claim rather than a right. See the opinion of Mr. Sutherland, cited in Elem. Hin. Law, App., p. 301, which is to the same effect; and of Mr. Colebrooke, Ibid. pp. 361 and 385.

† *Mitac.*, Chap. i., Sec. 3, §§ 4; and Case 15, Vol. ii., Chap. Effects liable and not liable to Partition, (note.)

‡ S. D. A. Reports, vol. i., page 6, new ed. p. 7.

§ See note to Precedents, Case 4, Chap. of Sons, &c., vol. ii.

‖ What constitutes the use of joint stock is not unfrequently very difficult to determine, and no general rule can be laid down applicable to all cases that may arise. Each individual case must be decided on its own merits. See Elem. Hindu Law, App., p. 306.

labour the acquisition has been made is alone entitled to the benefit of it.* And where property has been acquired without aid from joint funds, by the exclusive industry of one member of an undivided family, others of the same family, although they were at the time living in coparcenary with him, have no right to participate in his acquisition.† The rule is the same with respect to property recovered, excepting land, of which the party recovering it is entitled to a fourth more than the rest of his brethren.‡ It has also been ruled, that if lands are acquired partly by the labour of one brother, and partly by the capital of another, each is entitled to half a share; and that if they were acquired by the joint labour and capital of one, and by the labour only of the other, two-thirds should belong to the former, and one-third to the latter; but this provision seems rather to be founded on a principle of equity than any specific rule of Hindu law.§

Case of land recovered.

Presents received at nuptials, as well as the acquisitions of learning and valour, are, generally speaking, not claimable by the brethren on partition; and there are some things not subject to the ordinary law of partition: but for a more detailed account of indivisible and specially partible, the reader is referred to the translation of *Jagannátha's* Digest, vol. iii., page 332 *et seq.*, and to the chapter in vol. ii., treating of

Property not subject to partition.

* Dig, vol. iii., p. 110.

† Kaleepershaud Rai and others, *v.* Degumber Rai, S. D. A. Reports, vol. ii., p. 237, new ed. p. 305.

‡ *Sancha*, cited in Ibid, p. 365; and Elem. Hin. Law, App., p. 313.

§ Case of Koshul Chukrawutee, *v.* Radhanauth Chukrawutee, S. D. A. Reports, vol. i., page 336, new ed. p. 448.

effects liable and not liable to partition. According to the more correct opinion, where there is an undivided residue, it is not subject to the ordinary rules of partition of joint property : in other words, if at a general partition any part of the property was left joint, the widow of a deceased brother will not participate, notwithstanding the separation, but such undivided residue will go exclusively to the brother.*

Partition may be made without having recourse to writing or other formality ; and in the event of its being disputed at any subsequent period, the fact may be ascertained by circumstantial evidence. It cannot always be inferred from the manner in which the brethren live, as they may reside apparently in a state of union, and yet, in matters of property, each may be separate ; while, on the other hand, they may reside apart, and yet may be in a state of union with respect to property : though it undoubtedly is one among the presumptive proofs to which recourse may be had, in a case of uncertainty, to determine whether a family be united or separate in regard to acquisitions and property.† The only criterion seems to consist in their entering into distinct contracts, in their becoming sureties one for the other, or in their separate performance of other similar acts, which tend to show, that they have no dependance on or connexion with each other.‡ In case of an undivided Hindu family, the

Evidence of partition.

* Elem. Hin. Law, App., p. 322.

† See note to Sudder Dewanny Adawlut Reports, vol. i., page 36, new ed. p. 46.

‡ Dig. vol. iii., p. 414 ; and see Cases, Chap. of Evidence of Partition ; also Colebrooke, cited in Appendix, Elem. Hindu Law, page 325 et seq.

Court of Sudder Dewanny Adawlut were of opinion that their acquisitions should be presumed to have been joint till proved otherwise, the *onus probandi* resting with the party claiming exclusive right ;* and, in another case, a member of a Hindu family, among whom there had been no formal articles of separation, but who, as well as his father, messed separately from the rest, and had no share of their profits and loss in trade, though he had occasionally been employed by them, and had received supplies for his private expenses, was presumed to be separate, and not allowed a share of the acquisition made by others of the family.† The law is particularly careful of the rights of those who may be born subsequent to a partition made by the father. With respect to ancestral property, it is not likely that the just claims of any of the heirs can be defeated, as the law prohibits partition so long as the mother is capable of bearing issue ; but to guard against the possibility of such an occurrence, it is provided, that the father shall retain two shares, to which shares, if a son be subsequently born, he is exclusively entitled. There is another provision also which forms an effectual safeguard against the destitution of children born subsequently to a partition, which consists in the father's right of resumption, in case of necessity, of the property which he may have distributed among his sons.‡

* Case of Gourchunder Rai and others, *v.* Hurrochunder Rai and others, S. D. A. Reports, vol. iv., page 162, new ed. page 206.

† Rajkishor Rai and others, *v.* the Widow of Santoo Das, S. D. A. Reports, vol. i., p. 13, new ed. p. 17.

‡ See Precedents, Case 3, Chap. of Partition, vol. ii.

CHAPTER V.

OF MARRIAGE.

On the subject of marriage, it may be presumed that it has not often constituted a matter of litigation in the civil courts, from the circumstance, that points connected with it do not appear to have been referred to the Hindu law officers. Disputes connected with this topic, as well as those relating to matters of caste generally, are, for the most part, adjusted by reference to private arbitration. It is otherwise in the provinces subject to the presidencies of Madras and Bombay, where many matrimonial disagreements and questions relative to caste have been submitted to the adjudication of the established European courts.* As, however, questions relative to marriage are among those which the Company's courts are, by law, called upon to decide, it may not be amiss to cite some of the fundamental rules connected with the institution.

Marriage, among the Hindus, is not merely a civil contract, but a sacrament ;† forming the last of the

* See Appendix, Elements Hindu Law, page 22 et passim, and Bombay Reports, pages 11, 35, 363, 370, 379, and 389, vol. i., and pages 108, 323, 434, 473, 576, and 685, vol. ii.

† Act No. III. of 1872, passed by the Governor-General of India in Council, provides a form of marriage in certain cases. G.

ceremonies prescribed to the three regenerate classes, and the only one for *Sudras*;* and an unmarried man has been declared to be incapacitated from the performance of religious duties.† It is well known that women are betrothed at a very early period of life, and it is this betrothment, in fact, which constitutes marriage. The contract is then valid and binding to all intents and purposes. It is complete and irrevocable immediately on the performance of certain ceremonies,‡ without consummation. Second marriages, after the death of the husband first espoused, are wholly unknown to the Hindu law;§ though in practice, among the inferior castes, nothing is so common. Polygamy is also legally prohibited to men, unless for some good and sufficient cause, such as is expressly declared a just ground for dissolving the former contract, as barrenness, disease, or the like. This precept, however, is not much adhered to in practice. The text of *Manu*, which in fact prohibits polygamy, has been held, according to modern practice, to justify it. "For the first marriage of the twice-born classes," says *Manu*, "a woman of the same class is recommended; but for such as are impelled by inclination to

* Digest, vol. iii., page 104.

† Ibid. Vol. ii., page 400.

‡ Ibid. page 484; and for an account of ceremonies observed at a marriage, see As. Res, vol. vii., page 288; also Ward on the Hindus, vol. i., page 130 et seq.

§ But a widow who, from a wish to bear children, slights her deceased husband *by marrying again*, brings disgrace on herself here below, and shall be excluded from the seat of her lord. *Manu*, cited in Dig., page 463, vol. ii. M. Act XV. of 1856 of Government of India removes all legal obstacles to the marriage of Hindu widows. G.

marry again, women in the direct order of the classes are to be preferred."* From this text it is argued by the moderns, that, as marriage with any woman of a different class is prohibited in the present age, it necessarily follows that a plurality of wives of the same class is admissible; but the inference appears by no means clear, and the practice is admitted by the *pundits* to be reprehensible; though nothing is more common, especially among the *Kooleen*, or highest caste of Brahmins.

In the event of a man forsaking his wife without just cause, and marrying another, he shall pay his first wife a sum equal to the expenses of his second marriage, provided she have not received any *Stridhun*, or make it up to her, if she have; but he is not required, in any case, to assign more than a third of his property. In all cases, and for whatever cause a wife may have been deserted, she is entitled to sufficient maintenance. In the *Mitácshará*, a distinction is made. Where a second wife is married, there being a legal objection to the first, she is entitled to a sum equal to the expenses incurred in the second marriage; but, where no objection whatever exists to the first wife, a third of the husband's property should be given as a compensation.† But in modern practice, a husband considers it quite sufficient to maintain a superseded wife by providing her with food and raiment.

* *Manu*, Chap. iii., §§ 12.

† *Yajnyawalcya*, cited in Dig., vol. ii., page 420; and see a case to this effect stated, Elem. Hin. Law, App., p. 51.

There are eight forms of marriage: *The Brahma*, *Daiva*, *Arsha*, *Prajapatya*, *Asura*, *Gandharva*, *Racshasa*, and *Paisacha*.

The four first forms are peculiar to the *Brahminical* tribe. The principle in these contracts seems to be, that the parties are mutually consenting, and actuated by disinterested motives.

The fifth form is peculiar to *Vaishyas* and *Sudras*. It is reprobated, on the principle of its being a mercenary contract, consented to by the father of the girl for a pecuniary consideration. The sixth and seventh forms are peculiar to the military tribe, where the union is founded either on reciprocal affection or the right of conquest. And the eighth or last is reprobated for all, being accomplished by means of fraud and circumvention.*

The most usual form of marriage is that of the *Brahma*, which is completed "when the damsel is given by her father, when he has decked her, as elegantly as he can, to the bridegroom whom he has invited," the nuptials of course being celebrated with the usual ceremonies. The next species of marriage most usually practised is that of the *Asura*, where a pecuniary consideration is received by the father; and I am given to understand that marriages by the *Paisacha* mode are not uncommon; and that young women, who from their wealth or beauty may be desirable objects, are, not unfrequently, inveigled by artifice into matrimony; the forms of which once gone

* Digest, vol. iii., page 606.

through, the contract is not dissoluble on any plea of fraud, or even of force.*

The *Gandharva* marriage is the only one of the eight modes for the legalizing of which no forms are necessary ;† and it seems that mutual cohabitation, as it implies what the law declares to be alone necessary, namely, "reciprocal amorous agreement," would be sufficient to establish such a marriage, if corroborated by any word or deed on the part of the man.‡

The relations with whom it is prohibited to contract matrimony are thus enumerated by *Manu*: "She who is not descended from his *paternal* or *maternal* ancestors within the sixth degree, and who is not *known by her family name to be* of the same primitive stock with his father or *mother*, is eligible by a twice-born man for nuptials and holy union."

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* This is not the only instance in which fraud is legalized by the Hindu law. That law sets aside gifts or promises made for the purpose of delusion, though this is fraud on the side of the person who practises the imposition, and can entitle him to no relief. The same law allows to the creditor a lien upon a deposit or commodate in his hands for the recovery of his due from the debtor who so entrusts any article to him; and even permits the practice of trick and artifice, to obtain possession of such an article with the purpose of retaining it as a pledge. —Colebrooke, Obl. and Con., Book ii., §§ 95, and Book iv., §§ 518.

† This form of marriage is declared to be peculiar to the military tribe. May not the indulgence have originated in principles similar to those by which, according both to the civil and English law, soldiers are permitted to make nuncupative wills, and to dispose of their property without those forms which the law requires in other cases?—Bl. Comm., vol. i., page 417.

‡ On this principle the law officers of the Sudder Dewanny Adawlut declared legal a marriage contracted in Cuttack, not very long ago, in

Adultery is a criminal, but not a civil offence, and an action for damages preferred by the husband will not lie against the adulterer.* It is not a sufficient cause for the wife to desert the husband, and there are not many predicaments in which such an act on her part is justifiable. Insanity, impotence, and degradation, are, perhaps, the only circumstances under which her desertion of her husband would not be considered as a punishable offence.† A married woman has no power to contract, and any contract entered into by her, will neither be binding on herself nor on her husband, unless the subject of the contract be her own peculiar property, or unless she have been entrusted with the management of her husband's affairs; or unless the contract may have been requisite to her obtaining the necessaries of life.‡

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a case where the parties had cohabited for some time, and the man signified his intention by placing a garland of flowers round the neck of the woman. See also Elem. Hin. Law, App., p. 198.

* Colebrooke, cited Elem. Hin. Law, App., p. 33. So also our Regulations, following the Moohummudan law in this particular, treat the offence as a crime against society, and not against the individual, but they require that the husband shall stand forward to prosecute. There is a case cited by the author of the Elem. Hin. Law, (App. p. 34,) in which the *pundits* ruled, that the adulterer was liable for the money expended by the injured husband in contracting a second marriage; but this was considered to be rather an equitable opinion, than founded on any express text of law.

† *Manu*, cited in Digest, vol. ii., page 412.

‡ Colebrooke, Obl. and Con., Part I., Book ii., §§ 57 and 58.

CHAPTER VI.

OF ADOPTION.

The etymology of the Sanscrit word for a son (*putra*) clearly evinces the necessity by which every Hindu considers himself bound to perpetuate his name. "Since the son (*trayate*) delivers his father from the hell named *put*, he was, therefore, called *putra* by Brahma himself."* Again: "A son of any description should be anxiously adopted by one who has no male issue, for the sake of the funeral cake, water, and solemn rites, and for the celebrity of his name."† Under this feeling, it was natural to resort to the expedient of adoption. Twelve sorts of sons have accordingly been enumerated by *Manu*. "The son begotten by a man himself *in lawful wedlock:* the son of his wife, begotten in the manner before described; a son given *to him; a son made or adopted;* a son of concealed birth, *or whose real father cannot be known;* and a son rejected by his natural parents; are the six kinsmen and heirs. The son of a young woman *unmarried*, the son of a pregnant bride, a son

* Institutes of *Manu*, Chap. ix., §§ 138.

† *Smriti* quoted in the *Retnácara;* or, in the language of Statius, "*Orbitas omni fugienda nisu. Orbitas nullo tumulata fletu.*"

bought, a son by a twice married woman, a son self-given, and a son by a *Sudra*, are the six kinsmen, but not heirs to *collaterals*."*

In treating of the miscellaneous customs of Greece, the author of the Antiquities† observes as follows: —"Adopted children were called *Paidesthetan* or *Eispoiêtoi* and were invested in all the privileges and rights of, and obliged to perform all the duties belonging to, such as were begotten by their fathers: and being thus provided for in another family, they ceased to have any claim of inheritance and kindred in the family which they have left, unless they first renounced their adoption, which the laws of Solon allowed them not to do, except they had first begotten children to bear the name of the person who had adopted them, thus providing against the ruin of families, which would have been extinguished by the ruin of those who were adopted to preserve them. If the adopted person died without children, the inheritance could not be aliened from the family into which they were adopted, but returned to the relations of the persons who had adopted them. The Athenians are by some thought to have forbidden any man to marry after he had adopted a son, without leave from the magistrate; and there is an instance in Tytzes's Chiliads of one Leogoras, who being ill used by Andocides the orator, who was his adopted son, desired leave to marry. However, it is certain that some men married after they had adopt-

* Institutes of *Manu*, Chap. ix., §§ 159 and 160.

† Vol. ii., p. 336.

ed sons; and if they begot legitimate children, their estates were equally shared between those begotten and adopted."

The whole, or nearly the whole, of the provisions above cited, are strictly applicable to the system of adoption as it prevails among the Hindus at this day. But the renunciation of adoption is a thing unheard of in these provinces, and unsanctioned by law under any circumstances. There is no express text declaring illegal a renunciation of adoption, but at the same time there is not any which can be construed as approaching to a justification of it.

What forms at present allowed.

In the present age, two, or at the most three, forms of adoption only are allowed, in these provinces; and the *Dattaca*, or son given, and the *Critrima*, or son made, are the most common. The latter form obtains only in the province of Mithilá. In strictness, perhaps, adoption in this form should be held to be abrogated, as the filiation of any but a son legally begotten, or given in adoption, is declared obsolete in the present age;* but agreeably to a text of *Vrihaspati*, immemorial usage legalizes any practice.† Some of the requisite conditions for the adoption of a son are comprized in the following texts of *Manu*:—"He whom his father or mother,‡ with her husband's assent, gives to another as his son, provided that the donee have no issue, if the boy be of the same class,

Dattaca form of adoption.

* See general note by Sir W. Jónes, appended to his translation of *Manu's* Institutes; and the text of the *Adityá Purána*, cited in *Jagannátha's* Digest, vol. iii., page 272.

† Cited in the Digest, vol. ii., page 128.

‡ Section 4, §§ 12.

and affectionately disposed, is considered as a son given, *the gift being confirmed* by *pouring* water." "He is considered as a son made or *adopted*, whom a man takes as his own son, the boy being equal in class, endued with filial virtues, acquainted with the merit of *performing obsequies to his adopter*, and with the sin of omitting them."* But there are many conditions besides these fundamental ones: and briefly noticing such of the rules as are indisputable, and universally admitted, I shall discuss those which have admitted of doubt; and endeavour to fix such as are uncertain, by citing the authorities in support of each. Regarding this particular branch of the law, there is not much difference in the doctrine of the several schools; the *Dattacachandricá* and *Dattacamimánsá*, the two chief authorities on the subject, being respected by all. The first text above cited is sufficiently explicit as to the persons who possess the right of giving in adoption; and the only exception that has been propounded by the commentators is contained in the *Dattacamimánsá*, which refers to the gift of her son by a widow during a season of calamity; and it has been made a question of doubt, whether a widow, even with the sanction of her husband, is competent to adopt a son; but her competency so to do is established by the prevailing authorities. It has been ruled, however, that in the case of an adoption made by a widow without having obtained the consent of her husband, (or in which the adopted son shall not have been delivered over to

and *Critrima* form.

A widow, if in distress, may give her son in adoption.

And may adopt, with sanction of her late husband.

* Institutes of *Manu*, Chap. ix., §§ 168 and 169.

her by either of his parents, but only by his brother,) the adoption is invalid.* It is required that the party adopting† should be destitute of a son, and son's son, and son's grandson ;‡ that the party adopted should neither be the only nor the eldest

Qualifications of the adopting, and of the adopted party.

* Case of Taramunee Dibia, *v.* Dev Narayun Rai and another, Sudder Dewanny Adawlut Reports, vol. iii., page 387, new ed. p. 516. The same principle was recognized in the case of Raja Shumshere Mull, *v.* Rance Dilraj Koonwur, Ibid, vol. ii., page 169, new ed. p. 216.

† It has been doubted by Mr. Sutherland, in his Synopsis, whether an unmarried person, that is, one not a *grihi*, or as we would say, bachelor, is competent to adopt; but he inclines to the affirmative of the question (p. 212). In the Precedents, vol. ii. of this work, in the case of adoption No. 1, the *pundits* expressly declared the adoption by such individual to be legal and valid, and there is certainly no authority against it. The same doubt is expressed, and the same conclusion arrived at, with respect to an adoption by a blind, impotent, or lame person.

‡ *Sounaka*, cited in *Datt. Mim.* It has also been doubted by the author of the Considerations (p. 150), whether a man having a grandson by a daughter can adopt a son; but there is no solid foundation on which such a doubt can rest. It must have originated in the indiscriminate use of the word "grandson" in the English translations, as applicable to the daughter's son, as well as to the son's son. Mr. Sutherland, in his Synopsis, page 212, infers, and justly, that if male issue exist who are disqualified by any legal impediment (such as loss of caste) from the performance of exequial rites, the affiliation of a son may legally take place. In the Summary of Hindu Law, p. 48, it is laid down as a rule, that the insanity of a begotten son would not justify adoption by the parent; but to this and other general positions laid down in that work I cannot altogether accede: for instance, it is stated, that the *Poonah Shastrees* do not recognize the necessity that adoption should precede marriage; that a younger brother may be adopted by an elder one; that the youngest son of a family cannot be adopted, &c., &c., for none of which can I find authority; though undoubtedly the whole of these positions may be just when applied to that side of India, as founded on the *lex loci*, or immemorial custom.

son,* nor an elder relation, such as the paternal or the maternal uncle ;† that he should be of the same tribe as the adopting party ;‡ that he should not be the son of one whom the adopter could not have married, such as his sister's son or daughter's son. This last rule, however, applies only to the three superior classes, and does not extend to *Sudras*.§ It is a rule also, that when a woman adopts, she should have the consent of her husband ; or according to the law laid down in some authorities, the sanction of his kindred ;‖ that where there is a brother's son, he should be selected for adoption in preference to all other individuals ; but this is not universally indispensable, so as to invalidate the adoption of a stranger.¶ *Dattacachandricá*, Section 1, §§ 22. In the cass of Ooman Dutt,

Exception in case of *Sudras*.

Widow may adopt, with sanction of kindred, according to some authorities.

* *Vasishtha*, *Dutt. Nir.* and *Manu*, Ibid ; but this is an injunction rather against the giving than the receiving an only or elder son in adoption, and the transfer having been once made, it cannot be annulled. This seems but reasonable, considering that the adoption having once been made, the boy *ipso facto* loses all claim to the property of his natural family. See Bombay Reports, case of Huebut Rao, *v.* Govind Rao, vol. ii., page 75 ; also Elem. Hin. Law, App., pp. 82 and 83.

† *Datt. Mim.* Sect 2, §§ 32. Sudder Dewanny Adawlut Reports, vol. iii., p. 232, new ed. p. 310, *Mit.* on *Inh.*, Chap. i., Section 11, p. 12, new ed. p. 316.

‡ *Manu*, Chap. ix., §§ 168.

§ *Nareda*, cited in *Dutt. Nir.*

‖ According to the *Vyavaharakoustabha* and *Mayuc'ha*, authorities of the highest repute among the *Mahrattas*, which in this respect follow the doctrine of the *Dattacachandricá*, the sanction of the husband is not requisite ; but in this respect the authorities above cited differ from most others. Bom. Rep., vol. i., p. 181, and vol. ii., pp. 76 and 456. See also Elem. Hin. Law, Appendix, pp. 66, 68, 71.

¶ Sudder Dewanny Adawlut Reports, vol. iii., p. 144, new ed., p. 192.

pauper, appellant, *v.* Kunhia Singh, it was held, that while a brother's son exists, the adoption of any other individual is illegal; and this is undoubtedly consonant to the doctrine contained in the *Dattacamimánsá*, but it is controverted in the *Dattacachandrieá*. It would appear, however, that according to the law of Bengal and elsewhere, where the doctrine of the latter authority is chiefly followed, and where the doctrine of "*factum valet*" exists, a brother's son may be superseded in favour of a stranger; and even in Benares, and the places where the *Mimánsa* principally obtains, and where a prohibitory rule has in most instances the effect of law, so as to invalidate an act done in contravention thereto, the adoption of a brother's son or other near relative is not essential, and the validity of an adoption actually made does not rest on the rigid observance of that rule of selection, the choice of him to be adopted being a matter of discretion.* It may be held, then, that the injunction to adopt one's own *Sapinda*, (a brother's son is the first,) and failing them, to adopt out of one's own *Gotra*, is not essential, so as to invalidate the adoption in the event of departure from the rule. It is lastly requisite, that the adopted son should be initiated in the name and family of the adopting party, with the prescribed form and solemnities.† The adop-

A brother's son should be preferred.

But this rule does not invalidate the adoption of a stranger.

Must be initiated in the adopter's family.

* Colebrooke, cited in Elem. Hin. Law, Appendix, pp. 74 and 80.

† For an enumeration of the ceremonies enjoined at an adoption, see Summary Hindu Law, p. 52, and Elements Hindu Law, page 82 *et seq.*; but the exact observance of these ceremonies is not indispensable. Dig., vol. iii., page 242, and Elem. Hin. Law, App., pp. 101, 106.

tion being once completed, the son adopted loses all claim to the property of his natural family,* but he is estranged from his own family partially only. For the purposes of marriage, mourning, &c., he is not considered in the light of a stranger, and the prohibited degrees continue in full force as if he had never been removed. His own family have no claim whatever to any property to which he may have succeeded; and in the event of a son so adopted, having succeeded to the property of his adopting father, and leaving no issue, his own father cannot legally claim to inherit from him, but the widow of his adopting father will succeed to the property.† He becomes (with the exception above noticed) to all intents and purposes a member of the family of his adopting father, and he succeeds to his property, collaterally as well as lineally;‡ but excepting the case of the peculiar adoption termed *Dwyamushayana*, he is excluded

Effect of adoption.

His consanguineous relatives are not his heirs.

Exception in

* It has been asserted by the author of the Elements of Hindu Law, that a son adopted in the ordinary way, though he cannot marry among his adoptive, yet may one of his natural relations; but I cannot find any authority for this doctrine. He seems to have inferred it from the text of *Parijata*, "Sons given, purchased, and the rest, who are sons of two fathers, may not marry in either family even: as was the case of Singa and Saisira," that adopted sons not bearing the double relationship might do son; but the inference is clearly untenable. Indeed Mr. Sutherland, to whom he refers as his authority, expressly declares in his Synopsis (p. 219), that the adopted son cannot marry any kinswoman related to his father and mother, within the prohibited number of degrees, as his consanguineal relation endures.

† Elem. Hin. Law, Appendix, p. 104.

‡ *Manu*, Chap. ix., §§ 159.

from participating in his natural father's property.* Where a legitimate son is born subsequently to the adoption, he and the son adopted inherit together; but the adopted son takes one-third, according to the law of Bengal, and one-fourth, according to the doctrine of other schools.† If two legitimate sons are subsequently born, then, according to the Benares school, the property should be made into seven parts, of which the legitimate sons would take six; and according to the law as current elsewhere, into five shares, of which the legitimate sons would take four, and so on, in the same proportion, whatever number of legitimate sons may be born subsequently.‡

the case of a *Dwyamushayana.*

His share with a son subsequently born,

and with two or more.

A boy adopted by a widow with the permission of her late husband, has all the rights of a posthumous son, so that a sale made by her to his prejudice of her late husband's property, even before the adoption, will not be valid, unless made under circumstances of inevitable necessity:§ and in the case of a Hindu of Bengal, dying in his father's life-time without issue, but leaving a widow authorized to adopt a son, if

Has all the rights of a posthumous son.

* See Precedents of Adoption, Case 10, and of sisters' sons, &c., Case 7, *Vasishtha*, cited in the *Datt. Mim.* and *Catyáyana* in the *Dattacachandricá.*

† See the case of Srinath Serma, *v.* Radhakaunt, and Dutt Narain Singh and others, *v.* Rughoobeer Singh, Sudder Dewanny Adawlut Reports, vol. i., pages 15 and 20, new ed. pages 19 and 26.

‡ It is laid down in the *Dattacachandricá*, that in case of *Sudras*, if a legitimate son be subsequently born, he is entitled to an equal share only with the adopted son; and this rule prevails accordingly in the southern provinces.

§ Case of Rance Kishenmunee, *v.* Rajah Oodwunt Singh and another, S. D. A. Reports, vol. iii., p. 220, new ed. p. 304.

such adoption be made by the widow, with the knowledge and consent of her deceased husband's father, at any time before he shall have made any other legal disposition of the property, or a son shall have been born to his daughter in wedlock, no such subsequent disposition or birth shall invalidate the claim of the son so adopted to the inheritance.*

Example.

The above rules relate to a son adopted in the *Dattaca* form. But there is a peculiar species of adoption termed *Dwyamushayana*, where the adopted son still continues a member of his own family, and partakes of the estate both of his natural and his adopting father, and so inheriting is liable for the debts of each. To this form of adoption the prohibition as to the gift of an only son does not apply.† It may take place either by special agreement that the boy shall continue son of both fathers, when the son adopted is termed *Nitya Dwyamushayana*; or otherwise, when the ceremony of tonsure may have been performed in his natural family, when he is designated *Anitya Dwyamushayana*; and in this latter case, the connexion between the adopting and the adopted parties endures only during the life-time of the adopted. His children revert to their natural family.‡ With a legitimate son subsequently born,

Dwyamushayana form of adoption.

Of the *Nitya* form,

and *Anitya*.

His share with a son subsequently born.

* Case of Ramkishen Surkheyl, *v.* Srimutee Dibia, S. D. A. Reports, vol. iii., p. 367, new ed. p. 489. See also Colebrooke, in Elem. Hin. law, App., p. 102.

† See the case of Raja Shumshere Mull, *v.* Ranee Dilraj Koonwur, S. D. A. Reports, vol. ii., p. 169, new ed. p. 216.

‡ *Datt. Mim.*, Sec. 6, §§ 41 and 42.

the *Dwyamushayana* takes half a share of his adopting father's property.*

The question as to the proper age for adoption has been much discussed; and the most correct opinion seems to be, that there is no defined and universally applicable rule as to the age beyond which adoption cannot take place, so long as the initiatory ceremony of tonsure, according to one opinion, and of investiture, according to another, has not been performed in the family of the natural father.

Age of adoption.

In the *Dattacamimánsá*, the period fixed beyond which adoption cannot take place is the age of five years; and the ceremony of tonsure have been performed within that period in the family of the natural father, the son adopted cannot become a *Dattaca* in the ordinary form, but must be considered an *Anitya Dwyamushayana*, or son of two fathers. This can only be effected by the performance of the sacrifice termed *Putreshti*, by which the son is affiliated in both families.

According to the *Dattacamimánsá*.

In the *Dattacachandricá*† the period fixed for adoption is extended, with respect to the three superior tribes, to their investiture with the characteristic cords, which ceremony is termed *Oopunayuna*, and is subsequent

* *Datt. Chand.*, Sec. 5, §§ 33.

† The difference of opinion with respect to this point arises from a difference of grammatical construction. The term in the original is *Chudadya*, (signifying tonsure and the rest,) which is a compound epithet termed *Bukobrihee*, which again is divided into two kinds called *tadguna* and *atadguna*, inclusive and exclusive. According to those who adopt the former construction, adoption is lawful even after tonsure; but not so according to those who adopt the latter. The former construction is adopted by *Devandabhatta*; the latter by *Nandapandita*.

And according to the *Dattacachandricá*.

to that of tonsure, or *Chooracurana;* and with respect to *Sudras*, to their contracting marriage. But investiture in the one case, and marriage in the other, must be performed in the family of the adopting father. The periods fixed, however, for the investiture of the three superior tribes are different. That of a Brahmin should take place when he is eight years of age, which may be construed optionally, as signifying eight years from the date of conception, or from the date of birth. That of a *Cshetrya* at eleven years of age, and that of a *Vaisya* at twelve. But there are secondary periods allowed : for instance, the investiture of a Brahmin may be postponed until sixteen years after the date of conception ; that of a *Cshetrya* until twenty-two years after the same date ; and that of a *Vaisya* until twenty-four years. It should be observed, however, that were this ceremony of *Oopunayuna* has once been performed, an insurmountable bar to adoption is thereby immediately created. Its effect cannot, as in the case of tonsure before the age of five years, according to the authority of the *Dattacamimánsá*, be so far neutralized as to admit of its being re-performed after the ceremony of *Putreshti**

Periods of investiture for the different tribes.

* This has been doubted by the translator of the *Dattacachandricá* and *Dattacamimánsá*, in his Synopsis at the conclusion of that work, p. 225 ; and he diffidently expresses his inability to settle the question, though he inclines to the negative : but independently of there being no authority in support of the affirmative of the question, the fact that investiture constitutes a second birth is conclusive against it. Adoption is permitted on the principle that the adopted son is born again in the family of his adopting father ; but this cannot be where the investiture,

The authorities being entitled to equal weight in different parts of the country, the only ground of preference must be sought for in the different customs prevailing in different places. In the province of Bengal, and in the southern provinces, the more extended period should be assumed as the limit;* that being apparently consonant to the received practice; while in Benares, the *Dattacamimánsá*, which limits the period of adoption, should for the same reason be followed. In laying this down as a rule, it may be objected, that there do not exist sufficient grounds for the establishment of its accuracy. It is proper, therefore, that the grounds of the rule should be stated. In the precedents which I have collected, there is no case bearing directly on the point. Case 2, (which is a Bengal case) does not expressly prohibit adoption after the age of five years. And in the case of Kerutnarain, *versus* Musst. Bhobinesree, (the only adjudicated one for Bengal that I can find bearing on the question,†) the principle of the extended limit was fully discussed and admitted. The limitation to the age of five years is founded on a passage in the *Calicapurána*,‡ and the authenticity of that passage is doubtful. The *Dattacachandricá* makes no mention of it, though the *Datta-*

Period of adoption in Bengal and the southern provinces.

And in Benares.

Reason of the rule.

Precedents cited.

which causes the second birth, has already been performed in the family of the natural father.

* For the doctrine as to the age of adoption according to the southern authorities, see Elements of Hindu Law, page 75 *et seq.*, and Summary ditto, p. 50.

† Sudder Dewanny Adawlut Reports, vol. i., p. 161, new ed. p. 213.

‡ Digest, vol. iii., p. 228.

camimánsá does. The latter being a Benares authority, it may be proper to apply the limiting principle to that province, but not to Bengal or the Dekhan, where that principle is not only not recognized, but where it is denied, and adoptions continually take place at an age far exceeding five years. There is no standard work on the subject of adoption expressly for the Bengal school; but whenever there is any difference of opinion between the *Dattacamimánsá* and the *Dattacachandricá*, the doctrine of the latter conforms to that of Bengal; for instance, as to the share to be taken by an adopted with a legitimate son.* Other instances might be cited. If it should be considered that the reasons here given are insufficient to warrant the conclusion arrived at, it may at least be contended, that it is open to a Bengal *pundit* to adopt either authority, and that the adoption of that which admits the more extended limit, as being the more liberal construction, could not be objected to. The author of the Considerations on Hindu Law as current in Bengal,† seems adverse to the extension of the limit. He maintains, that in the case of Gopeemohun Deb, it was the opinion of all the *pundits* who were consulted on his behalf, that proof of his being under the age of five years was indispensable. He also alludes to a remark appended to the case of Kerutnarain, *v.* Musst. Bhobinesree, decided in the S. D. A.; but, with respect to the first, it may be observed, that

The Doctrine of the *Mimánsá* preferred in Benares, and that of the *Chandricá* elsewhere.

Argument continued.

* *Dáyabhága*, p. 155.

† Page 144.

there does not appear to have been any formal opinion actually taken; and, with respect to the second, it is not apparent from what authority the remark proceeded. The author of the Considerations lays it down as a second rule, that adoption cannot take place in any of the classes after the ceremony of tonsure shall have been performed. From what has preceded, it will appear, however, that "investiture" should have been substituted for the word "tonsure;" and that the doctrine should have been qualified by the provision, that if tonsure had been performed previously to the fifth year, it might be repeated in the family of the adopting father, the adopted son thereby becoming an *Anitya Dwyamushayana.* According to the *Muyooc'ha*, an authority of the greatest eminence among the Mahrattas, the restriction as to age relates only to cases where no relationship subsists; but when a relation, or *Sagotra*, is to be adopted, no obstacle exists on account of his being of mature age, married, and having a family.* In Mithilá, where the *Critrima*† form of adoption prevails, there is no sort of restriction, except as to tribe; it being requisite that the tribe of the adopting father and of the adopted son be the same. There is no limit as to age, and no condition as to the performance of ceremonies;‡ so much so, that

Adoption cannot take place after investiture, but may after tonsure under five years.

Among the Mahrattas, no restriction as to age of a relation.

Nor in the *Critrima* form.

According to which form a

* Bombay Reports, vol. i., p. 195.

† This form of adoption is wholly unknown in Bengal: but see note, Sutherland's Synop., p. 221, and case of Ooman Dut, *v.* Kunhia Singh, Sudder Dewanny Adawlut Reports, vol. iii., p. 144, new ed. p. 192.

‡ See the case of Kullean Singh, *v.* Kirpa Singh and another, Sudder Dewanny Adawlut Reports, vol. i., p 9, new ed. p. 11.

brother or a father may be adopted; and a *Critrima* does not lose relation to his natural family, but inherits in both.

Keshuba Misra, in the *Dwaita Purishishta*, treating of this description of adoption, has declared that a man may adopt his own brother,* or even his own father. But he, as well as his issue, continues after he adoption to be considered a member of his natural family,† and he takes the inheritance both of his own family and that of his adopting father.‡ Another peculiarity of this species of adoption, is that a person adopted in this form by the widow does not thereby become the adopted son of the husband, even though the adoption should have been permitted by the husband ;§ and the express consent of the person nominated for the adoption must be obtained during the life-time of the adopting party.‖ This relation of *Critrima* son extends, as has been already observed, to the contracting parties only ; and the son so adopted will not be considered the grandson of the adopting father's father, nor will the son of the adopted be considered the grandson of his adopting father. He does not inherit collaterally, being ninth in the enumeration, according to *Yajnyawalcya*.¶

Adopted by a widow, does not thereby become son of the husband,

and must himself consent to the adoption.

The relation does not descend

Does not inherit collaterally.

A man having a son, and a son's son,

It has already been observed, that a man who has a son, son's son, or son's grandson, is not competent

* The reverse of this opinion was maintained in the case of Baboo Runjeet Singh, *v.* Obhye Narain Singh, Sudder Dewanny Adawlut Reports, vol. ii., page 245, new ed. p. 315, but the authorities cited by the law officers in support of the doctrine laid down by them on that occasion had relation to the *Dattaca* form of adoption.

† Dig., vol. iii., p. 276.

‡ Sudder Dewanny Adawlut Reports, vol. iii., p. 307, new ed. p. 410.

§ Ibid, vol. ii., p. 27, new ed. p. 34.

‖ Ibid, p. 173.

¶ Dig., vol. iii., p. 276.

to adopt a son; and it would seem to follow, by analogy, that if a man has a son, and the son of an elder son deceased, he may give the former* away in adoption, because he cannot be considered as the father of one son only; the latter also bearing towards him the relation of a son to all intents and purposes, and supplying the place of the elder one. In the *Dattacamimánsá*, there is a prohibition against the gift of a son, where there are only two; but the precept is merely dissuasive, and not peremptory.

may give the former in adoption.

Two persons cannot join in the adoption of one son. A notion seems to have prevailed, that two brothers might adopt the same individual; but this is entirely erroneous.† The supposition seems to have proceeded on a misconstruction of the following text of *Manu*:—"If among several brothers of the whole blood, one have a son born, *Manu* pronounces them all fathers of a male child by means of that son."‡ But that text is not meant to authorize the adoption of a nephew even, by two or more brothers. The adopted son of one brother would of course offer up oblations to the ancestors of all, and so far would perform the office of a son to them also; but he would not take the estate of his adopting father's brothers, in the event of their having any nearer heir.

Two persons cannot adopt the same individual under any circumstances.

Another point which has been the subject of much discussion, is, as to whether an adopted son by the

* In this case the dissuasive precept against giving one of two sons would apply, but the adoption would nevertheless be valid.

† See Considerations on Hindu Law, p. 473 *et seq.*

‡ Cited in Dig., vol. iii., p. 266.

Dattaca form succeeds collaterally, as well as lineally; but this may now be fairly said to be set at rest, and decided in the affirmative. It is true that *Jimutavahana*, in the *Dáyabhága*, has contended that the son adopted in the *Dattaca* form cannot succeed to the property of his adopting father's relations; but the doctrine, being in opposition to the text of *Manu*, cannot be held entitled to any weight.* It should be observed, however, that a son so adopted has no legal claim to the property of a *Bandhu* or cognate relation: for instance, if a woman on whom her father's estate had devolved, adopt a son with the permission of her husband, the son so adopted will not be entitled to such estate, on his adopting mother's death. It will go to her father's brother's son, in default of nearer heirs. This point was determined in a case recently decided by the Court of Sudder Dewanny Adawlut.† It is not quite evident why a daughter's adopted son should be excluded from inheriting the estate of his adopting mother's father, while a son's adopted son's right of succeeding collaterally has been acknowledged, inasmuch as the maternal grandfather is enumerated among the kindred by all the Hindu legislators; but the reason is, that the party adopted in the latter case becomes the son

A *Dattaca* son succeeds collaterally, but not to the property of cognates.

Example.

Reason for his not succeeding to cognate's property.

* This question has been amply discussed in the Considerations on Hindu Law, p. 128 *et seq.* See also case of Shamchunder and Rooderchunder, *v.* Narayinee Dibia and Ramkishor Rai, Sudder Dewanny Adawlut Reports, vol. i., p. 209, new ed. p. 279.

† See the case of Gunga Mya, *v.* Kishon Kishore Chowdhry and others, Sudder Dewanny Adawlut Reports, vol. iii., p. 128, new ed. p. 170.

of a person whose lineage is distinct from that of the maternal grandfather.

Reason of the difference of opinion as to the *Dattaca's* right of collateral succession.

The difference of opinion existing as to whether a *Dattaca* should be considered as heir of the adopter's kinsmen or not, arises from a difference in the order of enumeration in the twelve descriptions of sons; some legislators maintaining that *Manu* included in the *Dattaca* among the first six, who are entitled to inherit collaterally, while others maintain that the same lawgiver ranked him among the last six, who can only inherit lineally. In the *Dwaita Nirnaya* the several opinions have been noticed, and the author of that work gives his own in favour of the *Dattaca*. In Sir William Jones's translation of the Institutes of *Manu*, the *Dattaca* is ranked among the first six; and a great majority of the *pundits* throughout the country who were consulted on the subject when it was agitated in the Supreme Court, expressed their opinion, that the *Dattaca* is entitled to inherit collaterally.* The author of *Dattacachandrica*, according to his usual expedient of reconciling conflicting doctrines, puts the decision of the question on the character of the claimant—a criterion, it must be confessed, not very precise.†

Authorities cited.

* This question was circulated by the Court of Sudder Dewanny Adawlut to all the courts under its jurisdiction, to ascertain the law on the point from their Hindu law officers. See page 161, Considerations on Hindu Law.

† I may here be permitted to introduce the following report of a case decided on the 30th April 1821, tending to establish this point, and as generally connected with the law of adoption. The report was not given with other decisions of the Sudder Dewanny Adawlut of the

It is clear, that a man having adopted a boy, and that boy being alive, he cannot adopt another. It is written in the *Dattacamimánsá*: "A man destitute

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same year; and from the importance of the case, it may be concluded that the omission was attributable to oversight.

The appellant in this case was Gourhurree Kubraj, guardian of Sheopershad Chowdree, a minor, against Musst. Rutnasuree Dibia, mother of Kuroona Kant Rai, also a minor.

The suit was originally instituted by the appellant against Kashee Kant Rai, in the Moorshedabad Provincial Court, on the 14th of March 1814, to recover possession of a three-anna share of the *zemindaree*, Pergunnah Tahirpoor, and the independent Kismuts Talgachee, Juggunnathpore, &c., &c. in *zillah* Rajshahye. The action was laid at Rs. 7,051, the estimated annual produce.

The plaint set forth, that Rajah Mohindernarain had five sons, viz., Ramindernarain, Rubindernarain, Jadubindernarain, Munneindernarain, and Oopindernarain, of whom Jadubindernarain and the two others last mentioned, died without children. On the death of Mohindernarain, one moiety of the six-anna share in Pergunnah Tahirpoor, which constituted his *zemindaree*, descended to Anundindernarain, the adopted son of Ramindernarain and father of Sheopershad, a minor, and the other half to Bhyrubindernarain, as heir to his adopting father Rághooindernarain, son of Rubindernarain. Anundindernarain Chowdree sold a five-pie share of his three-anna portion, and retained possession of the remaining portion. Bhyrubindernarain died in 1204, B. S., leaving Jugdusuree his wife, and Bunmalee Dibia his daughter. Jugdusuree obtained possession, and was registered as proprietor of her husband's share; and in the year 1212, B. S., gave Bunmalee, when she was nine years old, in marriage to the defendant. Bunmalee died on the 27th of Jaagoon 1213, B. S., before she arrived at years of maturity; and Jugdusuree likewise died on the 17th of Cheyt in the same year. As Sheopershad was entitled to perform the *sraddha* and to succeed to the property left by Jugdusuree, he presented a petition to the Collector to be registered as proprietor of the deceased's estate, which was opposed by the defendant, on the plea that Jugdusuree had made a gift in 1207, B. S., of the *zemindaree* and her other property to him and to his wife Bunmalee, to which he was therefore entitled: his claim was also opposed by Eshurchund, a person who represented himself to be the adopted son of the deceased, and who likewise applied for the entry of his own name. The

of a son *(aputra)* is one to whom no son has been born, or whose son has died; for a *text of Sounaka*

Collector rejected Sheopershad's application, and ordered the defendant's name to be entered for Jugdusuree's *zemindaree*, according to the conditional deed of gift produced by him, though contrary to the *Shasters*, and referred Sheopershad and Eshurchund to a civil suit. Eshurchund brought an action in the *zillah* court, through his guardian Gungaram Bhadurce, and obtained a decree, which was reversed on appeal by the Provincial Court, and his claim as adopted son rejected. This decision was subsequently affirmed by the Sudder Dewanny Adawlut, which Court passed an order, on the 4th of February 1813, directing Sheopershad to prefer his claim, as heir, either in the *Zillah* or Provincial Court, to the estate left by Jugdusuree, when it would be decided whether the deed of gift produced by Kashee Kant Rai was valid or not, according to the *Shasters*. Bunmalee Dibia was married to Kashee Kant in the year 1212, B. S., and the deed of gift produced by the defendant as having been executed by Jugdusuree in favour of himself (Kashee Kant) and his wife Bunmalee is dated the 23d of Assar 1207, B. S. Jugdusuree was in possession of the estate during her life-time, namely till Cheyt 1213, B. S., during which period Kashee Kant Rai (who was not competent to perform the exequial rites) had nothing to do with it, and no mention was made of the deed of gift. From the condition specified in the said deed, it appeared that the gift was made to Kashee Kant and Bunmalee Dibia, in the event of the latter becoming pregnant. It was very suspicious, and altogether unlikely that the idea of Bunmalee's pregnancy should have been entertained five years previous to her marriage, and inserted in the deed of gift. The instrument by which Jugdusuree bequeathed her property on her death to the defendant and Musst. Bunmalee is invalid, inasmuch as she is not empowered by the *Shasters* to alienate it by sale or gift, and as, moreover, Bunmalee died during the life-time of Jugdusuree, her succession was thereby defeated. Besides, by a compromise entered into formerly between Anundindernarain, the father of Sheopershad, and Bhyrubindernarain, the husband of Jugdusuree, it was provided, that the estate and property of either of them who should die without children should go to the survivor and his heirs; so that, in every point of view, Sheopershad was entitled to Jugdusuree's property.

The defendant in answer stated, that after three of the five sons of Rajah Mohindernarain had died without children, Rubindernarain,

expresses, "one to whom no son has been born, or whose son has died, having fasted for a son,

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grandfather of Bhyrubindernarain, the husband of Ranee Jugdusuree, and Ramindernarain, grandfather (as alleged by the plaintiff) of Sheopershad, became possessed of the six-anna share of *pergunnah* Tahirpoor. A moiety, or three-anna share, devolved at the death of Rubindernarain on Raghoindernarain by the law of inheritance, and on his death it went to Bhyrubindernarain, and on his dying without sons to his widow Musst. Jugdusuree. The remaining three-anna share descended to Anundindernarain, by a gift from Ranee Lukhee, widow of Ramindernarain, and a deed of compromise, alleged to have been executed by Bhyrubindernarain. The property did not go to Anundindernarain by right of adoption; for Ranee Lukhee, after her husband's death, had, in conformity to his permission, adopted in the first instance, a person named Roodurnarain, and on his death, Anundindernarain, without the permission of her husband, and in opposition to the *Shasters*, on which account she had made a gift to him of her estate. An adoption of this nature has never been recognized by the *Shasters*, by the usages of the Brahmins or other Hindu tribes. A suit was in consequence instituted in the *zillah* court between Bhyrubindernarain, and Anundindernarain, and regularly carried in appeal before the Sudder Dewanny Adawlut. The *vyavastha* submitted by the Pundit of the *zillah* court, which likewise coincided with five legal opinions filed by Bhyrubindernarain, invalidated the adoption. The *zillah* judge, however, acted on the opinion expressed by other Pundits which were submitted by Anundindernarain, and passed a decree in his favour, declaring in that decree, which was dated June the 30th, 1795, that the object of Ranee Lukhee in executing a deed of gift of that nature, was to secure to Anundindernarain in some way, either by adoption or by gift, the succession to her property, and that, in the event of any dispute arising after her death on the subject of the second adoption, there might be no doubt of her property descending to Anundindernarain under the deed of gift. By the decision of the superior court, the adoption of Anundindernarain was declared illegal, and he was allowed to succeed to the property solely on the ground of the deed of gift and the compromise, the authenticity of which was not ascertained. Besides, even supposing the adoption to have been valid, the person adopted is only entitled to the property of his adopting father, and has no claim to the property of his adopting father's family or collateral relations. Sheopershad, therefore, could have no

&c. :"* but it seems to be admitted, that a man having a legitimate son may not only authorize his wife

A man having a son or an adopted son,

title whatever to the three-anna share of the estate in dispute. The following, he affirmed, was the true state of the case. It is the usage among Brahmins for a *Kooleen*, when he marries into an inferior family, to receive a large valuable consideration. Accordingly, in 1207, B. S., Ranee Jugdusuree, wife of Bhyrubindernarain, who was of an inferior family, having agreed to give her daughter Bunmalee Dibia in marriage to him (the defendant), who was of the *Kooleen* caste, made a gift of her *zemindaree* and other property to his wife Bunmalee Dibia and himself, with the knowledge and consent of all her family, as well as of Anundindernarain. But, in consideration of their youth, she executed an *icrarnama* in the form of a will, in favour of his (the defendant's) father, Kalee Kant Rai, empowering him to superintend and take care of the estate during the period of their minority, and died in the year 1213, B. S. Anundindernarain also lived till 1212, B. S., subsequent to the execution and registry of the deed of gift; and, had he considered himself the heir of Ranee Jugdusuree, he would, undoubtedly, have opposed the proceeding, either at the time or at some subsequent period of his life. He, however, had never done so. On the death of Ranee Jugdusuree, Gungaram Bhaduree, the plaintiff's uncle, having persuaded Benood Ram Rai, proprietor of a ten-anna share in the above *pergunnah*, to collude with them, forged an *ijazutnama*, or deed of permission to adopt, and a *hibbanama* and other documents, and sued him (the defendant), first stating that Eshurchunder was the adopted son of the Ranee:

* Page 2.—There is a *vyavastha* maintaining the opposite doctrine, the authority cited for which is a verse ascribed to *Menu*, though not to be found in the Institutes: "Many sons are to be desired, that some one of them may travel to Gya." But this text obviously relates to legitimate sons. See the case of Goureepershaud Rai, *v.* Musst. Jymala, vol. ii., p. 136, new ed. p. 174, Sudder Dewanny Adawlut Reports. And Mr. Colebrooke observes, in a note to p. 42, new ed. p. 55, Ibid, that the validity of a second adoption, while another son, whether by birth or adoption, is living, is a question on which writers of eminence have disagreed; that *Jagannátha*, in his Digest, inclines to hold it valid; but that the author of the *Dattacamimánsá*, a work of great authority, maintains the contrary opinion.

may authorize his wife to adopt another, failing such son.

to adopt a son after his death, failing such legitimate son, but also, failing the son so adopted, to adopt another in his stead ;* and it has also been ruled, that

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but their claim was rejected, and, therefore, the present suit (fraudulently preferred on the ground that Sheopershad was the heir, and entitled to the property alienated by the gift of the Ranee) was altogether inadmissible; inasmuch as the illegality of Anundindernarain's adoption invalidated the claim of Sheopershad to the property of Ranee Jugdusuree; and the Ranee having, before the birth of Sheopershad, made a gift of her property to him (the defendant) and to his wife, it could not be considered as her estate on her death. Besides, he had himself, with his own money, paid off a mortgage contracted on the estate since the time of Bhyrubindernarain, when it would otherwise have been sold. The forgery of the deed of compromise produced by the plaintiff was evident, from the circumstance of its being dated on the 11th of Bhadoon 1212, B. S. The suit about the adoption of Anundindernarain, pending between him and Bhyrubindernarain, his (the defendant's) father-in-law, was decided in the Rajshahye *zillah* court on the 13th of Assarh in the above year, afterwards in the Provincial Court, and lastly in the Sudder Dewanny Adawlut on the 4th of Assin 1208, B. S. Had the deed of compromise been genuine, and in the possession of Anundindernarain, he would undoubtedly have brought it forward in some court of justice. And as the cause between Anundindernarain and Bhyrubindernarain was pending till 1208, B. S., it was extremely improbable that a compromise should have been entered into in 1202, B. S. Anundindernarain also was a minor at that time, and many suits had been preferred in the civil and criminal court and in the Collector's office relative to the estate between 1202 and 1213, B. S., a period of 12 years, during which Ranee Jugdusuree was alive; but no mention had ever been made of the compromise, nor had it ever been registered, or before produced.

On the death of the defendant, his wife, Musst. Rutnusuree Dibia,

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* Case of Shamchunder and Rooderchunder, p. 209, new ed. p. 279, vol. i., Sudder Dewanny Adawlut Reports, where it was established, that there may be two successive adoptions by the widows of the same man; and the case of Musst. Soolukhna, *v.* Ramdolal Pande and others, p. 324, new ed. p. 434, vol. i.

authority to a wife to adopt, in the event of a disagreement between her and a son of the husband,

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mother of Kuronah Kant Rai, his minor son, became his representative in the suit.

The plaintiff, in replication, maintained that Ramindernarain, grandfather of the minor Sheopershad, and his brother Rubindernarain, lived together as members of an undivided family. Rubindernarain died living a son, Raghoondernarain, his heir; and Ramindernarain died leaving his widow, Musst. Lukhee Ishuree, to whom he granted permission to adopt a son. In Kartik 1170, B. S., Raghoondernarain died leaving a widow, Musst. Sirsuttee, who with Lukhee Ishuree, the grandmother of the minor Sheopershad, enjoyed joint possession of the estate. Musst. Sirsuttee adopted Bhyrubindernarain, entered his name jointly with that of Lukhee Ishuree in the Collector's office, and died in 1162, B. S.; and the grandmother of Sheopershad died after having adopted Anundindernarain according to her husband's permission, put him in possession of the estate during her own life-time, and by means of an application effected the registry of his name instead of her own. Bhyrubindernarain afterwards instituted an action, on the ground that the adoption of Anundindernarain was illegal. By the decisions, however, of the *Zillah* and Provincial Courts and of the Sudder Dewanny Adawlut, the adoption of Anundindernarain was held to be valid, and a decree passed in his favour. There could, therefore, be no doubt of Sheopershad's title, and of his being the *Pindadhikar*, or person entitled to perform the exequial rites of Jugdusuree and Bhyrubindernarain. As Kalee Kant Rai, father of Kashee Kant, the defendant, was adopted by Kishen Kant Rai, and according to the *Shasters* the distinction of the *Kooleen* caste is lost on the adoption, and as the dignity of the ancestors of Mohindernarain (who were Rajahs) was superior, the allegations of the defendant relative to Jugdusuree having given her property to him on his marriage with her daughter, in consideration of his rank, were evidently false, inasmuch as from the time of the ancestors of Mohindernarain, Ramindernarain, and Anundindernarain, connexions had subsisted between them and the *Kooleen* Brahmins. No one ever gave his whole estate to his daughter and son-in law; but it is both the law and usage, that if a person dies without male issue, his estate will not devolve to his daughters, or daughters' sons, but only to the descendants from the same grandfather. In accordance with this custom, on the death of Indernarain Rai without male issue, his estate did

then living, will not avail; though authority to adopt, in the event of that son's death, would be valid.* It is a disputed point, whether a widow having

But whether she can with-

not go to Ramsingh, his daughter's son, who was alive, but to the persons descended from the same grandfather as himself. The truth of all these representations will be established on inquiry. If the father of Sheopershad had been aware of the gift alleged by the defendant, he would certainly have opposed it. It is singular that the deed of gift declares, that the gift is made for the performance of exequial ceremonies, and stipulates that Ranee Jugdusuree shall, during her life-time, retain possession of the above estate, and have the power of alienation by sale or gift. As, therefore, the Ranee enjoyed possession of the estate, and retained the power of disposing of it by gift or sale; and did, subsequently to the execution of the deed of gift, give, in the exercise of her proprietary right, *dewotter* and *bruhmoter* lands to many persons, and the donee did not obtain possession of the lands given to him, it did not clearly appear with what view the will in favour of the defendant's father was executed, or what law legalised a conditional gift of the above nature, or how, Bunmalee Dibia having died childless in the life-time of her mother, the condition relative to the performance of exequial ceremonies could hold good.

The rejoinder of Rutnusuree Dibia set forth, that as both the donor and the donee were dead, and the property given had descended as an hereditary estate, the claim of any person thereto was inadmissible according to the *Shasters;* and that her son, as the *Pindadhikar* of Bunmalee Dibia, was undoubtedly entitled to her property.

On the 13th of June 1817, the second judge of the Provincial Court dismissed the claim with costs, on the ground of the *vyavastha* submitted by the *pundit* of the court, which declared that an adopted son was entitled to the property of his adopting father, not to that of his adopting father's collateral relations; that a woman had not the power to adopt a second person on the death of an individual whom she had previously adopted, with her husband's permission; and that, therefore, Anundindernarain, and consequently Sheopershad, were not entitled to the property in dispute; and that the deed of gift executed by Jugdu-

* Case of Musst. Soolukhna, *v.* Ramdoolal Pande and others, vol. i., p. 325, new ed. p. 434.

with the sanction of her husband, adopted one son, and such son dying, she is at liberty to adopt another

out such sanction, is disputed.

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suree in favor of Bunmalee Dibia and Kashee Kant, her daughter and son-in-law, was valid.

The appellant being dissatisfied with this decision, appealed to the Court of Sudder Dewanny Adawlut, laying his claim at Rs. 15,151, three times the *sudder jumma* of the lands in dispute.

Eshurchunder Rai, the person claiming to have been adopted by Ranee Jugdusuree, presented a petition to the following effect :—

"The suit instituted by Gungaram Bhadurce, your petitioner's guardian, against Kashee Kant, to effect the reversal of the acting collector's order for the registry of Kashee Kant's name as proprietor of a three-anna share in *zemindaree* Pergunnah Tahirpoor, was decreed by the judge of *zillah* Rajshahye. This decision was, however, reversed in the Provincial Court, and the order of the Provincial Court was affirmed on the 4th of February 1813, by W. E. Rees, Esq., formerly acting judge of the Sudder Dewanny Adawlut. On your petitioner making frequent applications for redress to the former judges of this Court, he was informed by Mr. Harington, that when the cause of Sheopershad Chowdree came before the Court, they would take into consideration your petitioner's case, and decide upon it. As your petitioner's adoption is established by the papers in the case of Sheopershad, *v.* Kashee Kant, (No. 1779,) your petitioner hopes, that when the above cause comes before you, you will take into consideration the present petition, and the papers filed on the former trial, as well as the petitions for a review, and the *vyavasthas* of the *pundits* of this court filed in the cause of Ranee Siromunee and others, and afford him redress."

The case having been brought to a hearing before the second judge, (C. Smith,) all the pleadings and exhibits of the parties were perused, as well as two petitions presented by Eshurchunder Surma, two *vyavasthas* of the *pundits* of this Court, one in the case of Bijia Dibia, appellant, *v.* Unnapoorna Dibia, respondent, the other in the case of Shamchunder Chowdree, and Rooder Chunder Chowdree, appellants, *v.* Narainee Dibia Chowdrain and Ramkishore Rai, respondents, and the interrogatories of this Court to the *pundits* aforesaid ; the papers of the Rajshahye *Zillah* Court, the Provincial Court, and the Sudder Dewanny Adawlut in cause, (No. 846,) of Gungaram Bhaduree, guardian of Eshurchunder Surma, appellant, *v.* Kashee Kant Rai, respondent, and the decrees passed by all those three Courts therein. Copies of two *vyavasthas* of the *pundits* of

without having received conditional permission to that effect from her husband. According to the doc-

this court filed by the appellant's *vakeel*, and the proceedings in three different suits, viz., Bijia Dibia, appellant, *v.* Unnapoorna Dibia, respondent; Sohun Lal Khan, appellant, *v.* Ranee Siromunee, respondent; and Eshurchunder Paul and others, appellants, *v.* Kishen Govind Sein, respondent.

The *vyavastha* of the *pundits* in the case of Shamchunder and Rooderchunder, delivered on the 21st of August 1807, was to the following effect:—

Q. Subsequently to the death of Kishenkishore, his senior widow had adopted Nundkishore as a son, and, on the death of the son so adopted, the second widow of the said Kishenkishore adopted an individual called Ramkishore, who is still living: under these circumstances, Joogulkishore, a person adopted by Kishengopaul, the uterine brother of Kishenkishore, and his half brother Luchminarain's two sons, Shamchunder and Rooderchunder, claim the property left by Nundkishore and Kishenkishore: Now supposing the adoption of both the sons to have been proved, in this case, which of the claimants is or are entitled to inherit the property of Kishenkishore and Nundkishore? and does an adopted son succeed collaterally as well as lineally?

R. The property, whether consisting of moveables or immoveables, belonging to Kishenkishore, deceased, who left no issue of the body, will devolve on the son whom his younger widow had adopted according to the mode prescribed by law. The uterine son adopted by Kishenkishore's brother and his half brother's sons have no right of succession. The property of the deceased Nundkishore, in default of issue of his adopting mother, will devolve on the adopted son of his step-mother whom she adopted with her husband's sanction, provided he be endued with the requisite qualities, and able to benefit his parents by performing the *(Nitya)* indispensable and fixed observances, *(Nimittika)* casual rights, *(Camya)* supererogatory works (which are performed at pleasure, or through the desire of some advantage), *(Eesta)* essential ceremonies, as ablution, investiture, &c. *(Poorta)* acts of pious liberality, as digging a well, planting a grove, building a temple, &c., and so forth, prescribed to his own tribe. In this case, the surviving adopted son (of the second widow) being a nearer *sapinda* to the deceased son adopted (by the eldest widow) than the other relations who claim, he will succeed exclusively to the property, and the kinsmen will have no claim. This opinion is consonant to the doctrine of *Menu*, *Goutama*, and *Boudháyana*, the first of whom holds

trine of the *Dattacamimánsá*, the act would clearly be illegal; but *Jagannátha* holds that the second adop- Doctrine of *Jagannátha*.

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the first rank among legislators; and the doctrine is also consonant to the *Munwartha Mooktavuli*, *Dattacamimánsá*, *Vivádabhangárnava*, *Ratnácara*, and other authorities.

Authorities.—The text of *Devala* cited in the *Dáyatatwa* and other tracts: "All these sons are pronounced heirs of a man who has no legitimate issue by himself begotten." The passage of *Yájnyawalcya* cited in the *Dáyatatwa* and other law books: "The wife and the daughters, also both parents, brothers likewise."

"Of him who leaves no son, the father shall take the inheritance, or the brothers." *Menu.* The text of *Vrihaspati* cited by *Raghunandana* and others:—"*Menu* holds the first rank among legislators, because he has expressed in his code the whole sense of the *Vedas*: no code is approved which contradicts the sense of any law promulgated by *Menu*." The texts of *Menu* laid down in the *Ratnácara* and other tracts:—"Of the twelve sons of men, whom *Menu*, sprung from the self-existent, has named, six are kinsmen and heirs; six not heirs, except to their own father, but kinsmen. The son begotten by a man himself in lawful wedlock, the son of his wife begotten in the manner before mentioned, a son given to him, a son made or adopted, a son of concealed birth, or whose real father cannot be known, and a son rejected by his natural parents, are the six kinsmen and heirs." "*Menu*, sprung from the self-existent *Brahma*, and first of the fourteen *Menus*; among these twelve sons of men whom he has named, the first six are pronounced kinsmen and heirs to collaterals: the result is, that, as kinsmen, they offer the funeral cake and water to *Sapindas* and *Samanodacas*, and, as heirs, they succeed to the heritage of their collateral relations, on failure of male issue, as well as to the estate of their father." This is the explanation of *Cullucabhatta*. The following texts are laid down in the *Ratnácara* and others tracts. *Goutama.* "The son begotten by a man himself in *lawful wedlock*, the son of a wife *begotten by an appointed kinsman*, a son given, a son made by adoption, a son of concealed birth, and one rejected by his natural parents, are sons who inherit property. The son of an unmarried girl, the son of a pregnant bride, a son by a twice-married woman, the son of an appointed daughter, a son self-given, and a son bought, claim the family of their adopting fathers."

Boudháyana:—Participation of wealth belongs to the son begotten by a man himself *in lawful wedlock*, the son of his appointed daughter,

Of Bengal.

tion in such case would be valid, the object of the first having been defeated. According to the autho-

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the son begotten on his wife *by a* kinsman *legally appointed*, a son given, a son made *by adoption*, a son of concealed birth, and a son rejected *by his natural parents*. Consanguinity, *denoted by a common family appellation*, belongs to the son of an unmarried girl, the son of a pregnant bride, a son bought, a son by a twice-married woman, a son self-given, and a son of a priest by a *Sudra*." Although *Jimutavahana*, *Raghunandana*, and others, explaining the text of *Devala* cited in the *Dáyabhága*, has not reconciled the dispute in regard to the given son and the rest being heirs to collaterals or otherwise, yet it should not be therefore supposed that the given son has no right of collateral succession. The difference of opinion may be reconciled by referring to the distinction of the adopted son being *(Sugoona)* endued with good qualities, or *(Nirgoona)* not so endued. This is the doctrine contained in the *Ratnácara* and other authorities; and it must be admitted that the given son and the rest who are endued with good qualities, are entitled to succeed both to the adopting father and his kinsmen.

"It is also proper to affirm, as intended by that expression, that sons given and others, being virtuous, are entitled to the inheritance and so forth, in preference to a son by a twice-married woman or the like, if he be destitute of good qualities; but if all be destitute of good qualities, he who is superior as nearest allied by birth, shall take a full share of the paternal estate, and the rest shall have the portions allotted to them in the *Brahmapurana* and other works. The maintenance directed must consist in the receipt of such a share; else the *seeming* contradictions in the texts of *Menu* and others, and of *Yájnyawalcya* and the rest, could not be well reconciled. But some argue, from the concurrent import of the text of *Devala*, that the text of the *Brahmapurana* also relates to sons given and the rest, who are inferior in class to their adoptive fathers.— *Vivádabhangárnava.*

The *vyavasthá* in the case of Bijia Dibia against Unnapurna Dibia, was to the following effect:—

Q. Tarnee Choudhrain having, at her husband's death, taken possession of his entire property, real and personal, selected for adoption a boy named Kalikant, with her late husband's sanction. It appears from the deposition of a witness Bhowanishunker, adduced by Kalibhairub and the said Tarnee (who were defendants in this cause) that Kalikant died previously to the celebration of the ceremonies prescribed for adop-

rities which are followed in Bengal and Benares, a woman is competent, after the death of her husband, And Benares.

tion; but it appears from the statement of the plaintiff Bijia Dibia, that the boy died subsequently to his adoption. A few years after his death, the said Tarnee assigned over all the property which she held in her possession to her junior daughter's son (Kalibhairub), while her senior daughter was living and had a daughter. Subsequently the senior daughter was delivered of a son, who laid claim to a moiety of the property disposed of as above stated. Under these circumstances, was the said Tarnee, according to the law of Bengal, competent to give away all her husband's property to her daughter's son, while she had another daughter living, and is the deed of gift in such case valid and binding? Supposing the adoption of Kalikant to have been actually made in this case, was she (the said Tarnee) competent, after the death of such adopted son, to dispose of her adopted son's property by deed of gift in favour of her daughter's son?

R. A widow, without sanction of her husband's representatives, is incompetent to make a gift of his property which had devolved on her by right of inheritance, and the deed of gift which she made cannot be considered as valid or binding. No adopting woman is allowed to dispose of her adopted son's property which had devolved on her at his death, by a deed of gift in favour of one heir, while there is a possibility of the birth of another. This opinion is conformable to the *Dáyabhága*, *Dáyanirnaya*, *Dáyaruhasya*, *Vyavasthárnava*, *Dáyatatwa*, *Dáyanirnaya*, and other authorities current in Bengal.

Authorities.—"But the wife must only enjoy her husband's estate after his demise. She is not entitled to make a gift, mortgage, or sale of it." Thus *Catyáyana* says: "Let the childless widow, preserving unsullied the bed of her lord, and abiding with her venerable protector, enjoy with moderation the property until her death. After her, let the heirs take it." "Abiding with her venerable protector:" that is, with her father-in-law, or others of her husband's family, let her enjoy her husband's estate during her life; and not, as with her separate property, make a gift, mortgage, or sale of it at her pleasure. The *Dáyabhága*. It is laid down in the *Dáyanirnaya*, that "no widow is competent to make a gift, or mortgage, or sale of her husband's property, except for the sake of performing his exequial rites, or other necessary purpose; and she residing with her husband's family, is entitled to consume only such portion of his estate as may suffice for her subsistence.

And western provinces.

to adopt a son, provided he gave her permission to do so during his life-time; and, according to the law of the western provinces, with the sanction

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For women, the heritage of their husbands is pronounced applicable to use. Let not women on any account make waste of their husbands' wealth. The *Bharata*. By the word "waste" it is meant, that a woman cannot make a gift, sale, or other alienation of her husband's property at her pleasure. The *Dáyaruhasya*.

"The property of a person dying, leaving neither son, son's son, nor son's grandson, goes to his virtuous widow; but she cannot make any alienation, as sale or the like, of such property, excepting for the purpose of promoting her husband's spiritual benefit by giving a part of it, or for the purpose of saving her own life." The *Vyavastharnava*.

The text of *Náreda* laid down in the *Dáyaruhasya* :—"Every sort of contract made by a woman, not in a time of distress, is null and void, particularly the gift, mortgage, and sale of the house and field."

The word "wife" is employed as a term of general import: and implies, that the rule must be understood as applicable generally to the case of a woman's succession by inheritance. The *Dáyabhága*.

The following passage is cited in the *Dáyabhága* and *Dáyaruhasya* :—"They who are born, and they who are yet unbegotten, and they who are actually in the womb, all require the means of support; and the dissipation of their hereditary maintenance is censured."

The second judge recorded his opinion on the 2d of January, 1821, in these terms :—

"I am of opinion that neither of the parties in the present case are entitled to the property left by Ranee Jugdusuree, inasmuch as it has been established that Eshurchunder Chowdree, the appellant in the cause (No. 846), is the rightful heir. The proofs in favour of such a conclusion are fully detailed in my proceeding of this date. If, in concurrence with me, the Court, after admitting a review of judgment in case No. 846, reverse the decisions of this Court, and of the Provincial Court, and affirm the decree of the Rajshahye *Zillah* Court, it will be necessary to affirm the decree passed by the Moorshedabad Provincial Court in this case. If, however, on the contrary, they uphold the decree passed by this Court on the 4th of February, 1813, I consider the title of Sheopershad Chowdree (the appellant) to be, according to the *Shasters*, undoubtedly superior to that of Kasheekant Rai, the respondent's father. For Kasheekant Rai only stood in the rela-

BENGAL SECRETARIAT LIBRARY

of the husband's kindred, after his death; these authorities contending, that although a woman cannot

Reason of the doctrine.

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tion of a son-in-law, which ceased on his wife's dying without children during her mother's life-time, and his claim under the conditional deed of gift is altogether inadmissible according to the law of inheritance; inasmuch as the condition was cancelled by the death of the person on whom the fulfilment was enjoined, and on failure of Ranee Jugdusuree's own and adopted children, Sheopershad Chowdree, the appellant, appears the only person who has any title to succeed as heir." Under these circumstances, the second judge recorded his opinion, that the Court should either admit a review of judgment in Eshurchunder Chowdree's case, reversing the decrees of this, and of the Provincial Court, and affirming the decree of the Rajshahye *Zillah* Court, dated July the 12th, 1808, and uphold the decision of the first judge of the Moorshedabad Provincial Court, dated June 13th, 1817, dismissing Sheopershad's claim, and making the costs of all courts payable by the parties respectively; or that they should reject the application for a review in case No. 846, and, affirming this Court's decree dated the 4th of February 1813, should reverse the decision of the first judge of the Moorshedabad Provincial Court, and award to Sheopershad Chowdree a three-anna share of *zemindaree pergunnah* Tahirpoor, with mesne profits for the period during which it had been in the possession of Kasheekant Rai, charging the costs of both courts to the respondent.

The case was next brought before the third and officiating judges, (S. T. Goad and W. Dorin). Their proceeding of the 8th of February was to the following effect:—

"It appears that the appellant lays claim to a three-anna share in the *zemindaree* of *pergunnah* Tahirpoor, which was in the possession of Ranee Jugdusuree, who died in 1213, B. S. The Ranee was seized of the three-anna portion in dispute on the death of her husband Bhyrubindernarain in the year 1204 B. S. who left no male issue and only one daughter. The daughter also died at the age of nine or ten years, after her marriage with the late Kasheekant Rai, the respondent's husband. The appellant maintains, that the share in dispute, being the estate left by Bhyrubindernarain the husband of Jugdusuree, descends to his heir; and as he is the son of Anundindernarain, Bhyrubindernarain's uncle, who was adopted by Ranee Sirsuttee, and was likewise the second adopted son of Ranee Lukhee, he is entitled to it according to the law of inheritance. The respondent contends, that Ranee Jugdusuree transferred the above

of herself perform the ceremonies requisite to adoption, yet that there is no objection to her calling in the assistance of learned Brahmins, as is practised

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estate to her daughter and the husband of that daughter by a deed of gift executed on the 23d of Assarh 1207 B. S. under the expectation that her daughter would bear a son, and stipulating that she (the donor) should remain in possession of the lands during her life-time, as she accordingly did for six or seven years, and she opposes the claim preferred on the grounds of hereditary right by the appellant.

1st. Because the adoption of Anundindernarain by Ranee Lukhee, the wife of Ramindernarain, had not taken place according to the *Shasters*.

2d. Because, even if the adoption of Anundindernarain had been legal, the appellant's claim to succeed as heir to the estate of Bhyrubindernarain and Ranee Jugdusuree was inadmissible according to the *Shasters*, inasmuch as he could not claim relationship with the husband of Ranee Jugdusuree through the adoption of his father.

But with respect to the objections urged by the respondent to the legality of Anundindernarain's adoption by Ranee Lukhee, in conformity to the permission of her husband, it is only necessary to state that Anundindernarain died in 1212, B. S., till which time he was in possession of his adopting father's estate, and that it appears from a decree passed by this Court on the 28th of September 1801, in the case of Ranee Jugdusuree, appellant, *v.* Anundindernarain, a minor, respondent, that several objections raised to the adoption of Anundindernarain were overruled at the time by this Court, and the adoption declared to be valid. Bhyrubindernarain, moreover, the husband of the appellant upon that occasion, admitted the legality of the adoption. Adverting to the foregoing circumstances, the Court do not consider that the respondent is authorized, after so great a lapse of time, now to call in question the legality of Anundindernarain's adoption. And as it is evident, from several former *vyavasthas*, that the deed of gift executed by Ranee Jugdusuree for her husband's estate, to the possession of which she had succeeded on his dying without male issue, is perfectly invalid, it only remains to ascertain whether now the appellant is, according to the Hindu law, entitled to the estate in dispute as heir."

A copy of this proceeding was accordingly ordered to be laid before the *pundits* of the Court, together with the genealogical table furnished by the appellant, to enable them, after a due consideration of their con-

by *Sudras* on similar occasions. But according to the doctrine of *Vachespati*, whose authority is recog- Doctrine of the Mithilá school.

tents, to submit within a fortnight a *vyavastha* consonant to the Hindu law as current in Bengal, in reply to the following question :—

Q. If the deed of gift produced by the respondent be illegal, and at the death of Jugdusuree her husband's heirs had the right of succeeding her, in this case, is the appellant, according to the law of Bengal, entitled to the property in question by right of representation or otherwise ?

R. Although Bhyrubindernarain should have died leaving no issue but a daughter, and his property should have been enjoyed by his widow Jugdusuree during her life, and the deed of gift (produced by the respondent) of all her property in favour of her daughter and her husband be illegal, yet on her demise, her property, even though it be subject to the succession of her husband's heirs, will not devolve on the appellant ; for he cannot claim it by right of representation, as he being the son of Anundindernarain, the second adopted son of Lukhee Dibia, does not hold the rank of *Sapinda*. A person according to law may desire his wife to adopt his son, but neither by law nor custom can he direct her to adopt one, and after his death another. The second adoption by the widow must be considered as illegal, and the adopted son cannot thereby rank in the relation of a *Sapinda ;* and it follows, *a fortiori*, that the appellant has no tie of relationship with the deceased, when his father is debarred from that right. It appears in the question, that Bhyrubindernarain acknowledged the adoption of Anundindernarain ; and the Court, having rejected the objections expressed on the subject, admitted the adoption to be good and legal. The ruling authority is independent, and may act according to its pleasure ; but according to law, the second adopted son can be entitled to inherit the property of the individual only by whom he is adopted, and cannot inherit the property of his adopting parent's *Sapindas*. This opinion is consonant to the *Dattacamimánsá*, *Dattacachandricá*, *Vyavahâramátricá*, and other authorities, as current in Bengal.

Authorities.—The texts laid down in the above authorities : " By a man destitute of a son only, must a substitute for the same always be adopted : with some one recourse *(Yasmattasmat Prayatnatus)* for the sake of the funeral cake, water, and solemn rites." " The funeral cake :" the " *Sradha*, or funeral repast." " Water :" that is, the presenting water in the two united palms, and so forth. "Solemn rites :" meaning rites in

nized in Mithilá, a woman cannot, even with the previously obtained sanction of her husband, adopt a son

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honor of the deceased, cremation and the like. These are the cause *(hetu.)* The reason, occasioning the adoption, is the cause. This, from being used in the singular number, shows that these ceremonies collectively are the cause, and not individually; and consequently, the meaning is, that there is not a distinct affiliation, severally for each; but one adoption only, on account of the whole: for, on default of a son, the failure of the oblation of food and other rites is the consequence." The *Dattacamimánsá.*

As, in their proceeding of the 8th of February 1821, the Court did not require the *pundits* to give an opinion as to the legality or illegality of the adoption of Anundindernarain, they were directed to refrain from all consideration of the merits of that question; and taking for granted that it was legal, and that Anundindernarain was the adopted son of Ranee Lukhee, wife of Ramindernarain, to submit, within three days, a specific answer to the question proposed in the proceeding of the above date. It was added, that the Court would again take into consideration what was stated in their former *vyavastha* relative to the adoption of Anundindernarain, after their delivery of the second *vyavastha.* On the 21st of March 1821, the required reply was submitted, and was to the following effect:—

"Supposing the Court to determine that the adoption of Anundindernarain by Ranee Lukhee, the widow of Ramindernarain, was valid, yet, as it was a second adoption, he (Anundindernarain) could not be considered a *Sapinda* of Bhyrubindernarain, nor *a fortiori* could his son Sheopershad be considered a *Sapinda* of the said Bhyrubindernarain. Therefore, if, after the death of Ranee Jugdusuree, the widow of Bhyrubindernarain, the property which had devolved on her is to descend to her husband's heirs, Sheopershad cannot have any right of succession."

As it appeared that the *pundits* had still not given an explicit reply to the question propounded by the Court in their proceeding of the 8th of February, they were directed to give their opinion *de novo*, taking for granted that the adoption of Anundindernarain was valid and unobjectionable in every respect, and as if Anundindernarain were the sole adopted son of his adopting father; and the following was the purport of the third *vyavastha*, submitted on the 3rd of April 1821: That if Anundindernarain was the sole adopted son of his adopting father, and

after his death, in the *Dattaca* form ; and to this prohibitory rule may be traced the origin of the practice

Of the

there was otherwise no question as to the legality of his adoption, in such case he must be considered as a member of the *Gotra* of his adopting father, and legally entitled to the property of his adopting father's *Sapindas ;* and in the event of there being no nearer *Sapinda* to Bhyrubindernarain than the appellant Sheopershad, in such case the said appellant must be considered entitled to the estate. The *pundits'* opinion proceeded in the following manner :—This opinion is conformable to *Menu*, although the Court directed that our *vyavastha* should be delivered according to the law of Bengal ; and of all the authorities, the *Dáyabhága* is there most prevalent : and, although it is the opinion of *Jimutavahana*, quoting the text of *Devala*, and adopting his order of enumeration, that the son affiliated in the *Dattaca* form is not an heir of collateral relations *(Sapindas &c.,)* nevertheless, as many *vyavasthas* have been delivered in the Court establishing the adopted son's collateral succession according to the law promulgated by *Menu*, this opinion is delivered according to the same law.

Authorities.—Menu : "Of the twelve sons of men, whom *Menu*, sprung from the self-existent, has named, six are kinsmen and heirs ; six not heirs, *except to their* own father, but kinsmen. The son begotten by a man himself in lawful wedlock, the son of his wife begotten *in the manner before mentioned*, a son given to him, a son made or *adopted*, a son of concealed birth, *or whose real father cannot be known*, and a son rejected *by his natural parents*, are the six kinsmen and heirs." Commentary on the text of *Menu* by *Balambhatta :* "*Menu*, sprung from the self-existent *Brahma*, and first of the fourteen *Menus ;* among those twelve sons of men whom he has named, the first six are pronounced kinsmen and heirs to collaterals : the result is, as kinsmen, they offer the funeral cake and water to *Sapindas* and *Samanodacas ;* and as heirs, they succeed to the heritage of their collateral relations, on failure of male issue." The text of *Menu* laid down in the *Dáyabhága*, *Dáyatatwa*, *Dáyacramasangraha*, and other authorities : "To the nearest kinsman *(Sapinda)* the inheritance next belongs."

On the receipt of the above *vyavastha*, the Court observed, that from this *vyavastha* it appeared, that in consequence of the death of Ranee Jugdusuree, widow of Bhyrubindernarain, without male issue, in 1213, B. S., her husband's estate, which had been enjoyed by her during her life-time, would descend to her husband's nearest

Critrima form. of adopting in the *Critrima* form, which is there prevalent. This form requires no ceremony to complete it, and is instantaneously perfected by the offer

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heir; and, supposing Anundindernarain to have been the adopted son of Ramindernarain and Ranee Lukhee, and a member of the family, that Sheopershad, the original plaintiff in the present cause, would succeed hereditarily as a *Sapinda*. In concurrence, therefore, with the opinion expressed by the second judge, they passed a decree in favour of the appellant's claim, reversing the judgment of the Moorshedabad Provincial Court, and making the costs of both courts payable by the respondent. By the decree, possession of the three-anna share in dispute was awarded to the appellant, with mesne profits from the date on which the suit was instituted till put in possession. The following observations were introduced into the final decree.

It must be remembered that the proceeding of this Court under date the 8th of February last, declared the respondent disqualified to call in question on the present occasion the legality of the adoption of Anundindernarain, the appellant's father, inasmuch as the legality of that transaction had been admitted, and recognized by a decree passed by the Sudder Dewanny Adawlut on the 28th of September, 1801, (which corresponds with 1208, B. S.) in the case of Ranee Jugdusuree, appellant, *v.* Anundindernarain, respondent. It appears, moreover, that Anundindernarain was adopted in 1200, B. S., by Ranee Lukhee, and enjoyed possession of his adoptive father's estate till his own death in 1212, B. S., when he was succeeded by his son, who, as heir, continued in possession till the institution of the present suit in 1220, B. S. The same objection now urged to the adoption was preferred on the former trial, viz., that the adoption, by the wife of any *zemindar*, of a second son, after the death of a previously adopted individual, was invalid. Two of the soundest and most learned *pundits* of the day, however, viz., those of the Tirhoot and Nuddea *zillah* courts, who were called on to submit their opinions on the subject, pronounced, in concurrence with the *pundit* of the Rajshahye *zillah* court, the adoption to have been a legal transaction; and as the former judges of this Court in 1801, by their decree admitted and decided on the legality of Anundindernarain's adoption in the face of the alleged objection, the Court was of opinion that the above-mentioned decree, and the long lapse of time, does not leave the question of law open to their investigation. From the former decree of this Court, the grounds on which the judgment pronounced on

of the adopting, and the consent of the adopted party. It is natural for every man to expect an heir, so long as he has life and health; and hence it is usual for persons, when attacked by illness, and not before, to give authority to their wives to adopt. But in Mithilá, where this authority would be unavailable, the adoption is performed by the husband himself; and recourse is naturally had to that form of adoption which is most easy of performance, and therefore less likely to be frustrated by the impending dissolution of the party desirous of adopting.

Reason of its prevalence in Mithilá.

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that occasion was formed cannot be ascertained. But it is doubtful whether the former Court considered the adoption of Anundindernarain as a second adoption effected by Ranee Lukhee without permission from her husband, and legalized it proceeding on the *Ijazutnama* obtained by her from her husband, although it specified no permission for adopting a second person, or construing the tenor of the *Ijazutnama* to imply a tacit consent to the adoption of a second, on the death of the first son, which frustrated and nullified the object of the adoption, or whether they considered that the ceremonies of adoption had not been completely fulfilled in the case of the first son; for he died a few months afterwards, and, according to the testimony of several witnesses, before he had gone through the ceremonies of investiture. Yet although those circumstances have not been detailed, it is evident that by that decree the adoption of Anundindernarain, which it must be observed is no where described therein as a second *adoption*, was declared legal after a due consideration of all the objections urged, and he was pronounced a member of the family. The question of law, therefore, is quite irrelevant to the present case. The *Shasters* were merely consulted to ascertain whether the appellant Sheopershad, being descended from the same paternal grandfather, was entitled by the law of inheritance, to the estate in dispute; and the Court, in deciding that he is so entitled, have been guided by the above legal opinions and the *vyavastha* submitted by the *pundits* in the case of Shamchunder and others, appellants, *v.* Narainee Dibia, respondent. There are certain other points which the Court consider it advisable to notice here.

It is an universal rule in Bengal and Benares, that a woman can neither adopt a son, nor give away her son in adoption, without the sanction of her husband previously obtained; but it does not appear that the prohibition in Mithilá, which prevails against her receiving a son in adoption according to the *Dattaca* form, even with the previous sanction of her husband, he being dead, extends to her receiving a boy in adoption according to the *Critrima* form; and the son so adopted will perform her obsequies, and succeed to her peculiar property, though not to that of her deceased husband.* It is not uncommon in the province of Mithilá for the husband to adopt one *Critrima* son, and the wife another.

Sanction of the husband not requisite in this form of adoption.

The husband may have one *Critrima* son, and the wife another.

I have laid it down as a rule, that in the present age, adoption is allowable only in the *Dattaca*, *Dwyamushyana*, and *Critrima* forms; but I find, on refer-

1st. The authorities recited in the first *vyavastha* submitted in this cause do not affect the adoption of two sons by one wife of a deceased person, or even a second adoption generally; nor is such an allegation supported by the tenor of former *vyavasthas*, furnished by the *pundits* in the cases of Shamchunder and others, appellants, *v.* Narainee Dibia, respondent; and Goureepershad Chowdree, appellant, *v.* Mussummaut Jymala, respondent.

2dly. The respondent's *vakeel*, after the *vyavastha* was submitted, and while the cause was still pending, only contended that the adoption was illegal, inasmuch as it had taken place without the consent of the husband.

3dly. In the proceeding of this Court, and in the question propounded to the *pundits*, only the word "adoption" was at first mentioned: the word "second" was subsequently added at the request of the respondent's *vakeel*, as it was thought that it would not materially affect the decision. It was, however, mentioned, that according to the evidence, it was doubtful whether the ceremonies of adoption in the first case were regularly fulfilled.

* Suth. Synopsis, note 5, p. 222.

ence to the Elements of Hindu Law, that a question was agitated as to the admissibility of the *Crita*, or son bought. The point was much canvassed, and gave rise to a protracted controversy between two of the most eminent scholars of the day ;* and there is a case in the Sudder Dewanny Adawlut Reports,† in which the claimant was alleged to be of the *Paunerbhava* class,‡ and in which in all probability the claim would have been adjudged, had it been proved to be customary for sons of that description to succeed. Although, therefore, it may be asserted, that generally speaking, there are only three species of adoption allowable in the present age, yet the rule should be qualified, by admitting an exception in favour of any particular usage which may be proved to have had immemorial existence. Thus it appears that the *Goswamis*, and other devotees who lead a life of celibacy, buy children to adopt them in the form termed *Crita*, or son bought; and that the practice of appointing brothers to raise up male issue to deceased, impotent, or even absent husbands, still prevails in Orissa.§ The son so produced is termed *Cshetraja*, or son of the wife ; and doubtless these several sorts of subsidiary sons should be held entitled to the patrimony of their adopting fathers, in places where the *lex loci* would justify the affiliation.‖ In former times, it was the

Of the *Crita* son.

Of the *Paunerbhava*.

The *Goswamis* adopt in the *Crita* form.

Of the *Cshetraja*.

* See Elements Hindu Law, App., p. 107 *et seq.*

† Vol. i., p. 28.

‡ See *Mitac.*, Chap. i., Sect. 2, §§ 8.

§ Note to Dig., vol. iii., p. 276.

‖ See note, S. D. A. Reports, vol. ii., p. 175, new ed. p. 224.

practice to affiliate daughters, in default of male issue; but the practice is now forbidden.* The other forms of adoption enumerated by *Menu*† appear to be wholly obsolete in the present age. Any discussion, therefore, of their relative merits would be foreign to the purpose of this publication.

Other forms obsolete.

* *Jimutavahana*, cited in the Digest, vol. iii., p. 493.

† Institutes, Chap. iv., §§ 159 and 160.

CHAPTER VII.

OF MINORITY.

Agreeably to the Hindu law, as current in the Benares and Mithilá schools, minority is held to last until after the expiration of sixteen years of age ;* and according to the doctrine of Bengal, the end of fifteen years is the limit of minority.† Age of minority.

A father is recognized as the legal guardian of his children, where he exists ; and where the father is dead, the mother may assume the guardianship :‡ but where the duties of manager and guardian are united, she is, in the exercise of the former capacity, necessarilly subject to the control of her husband's relations: and with respect to the minor's person likewise, there are some acts to which she is incompetent, such as the performance of the several initiatory rites, the management of which rests with the paternal kindred. In default of her, an elder brother of a minor is competent to assume the guardian- Of guardians. Of the father's guardianship. Of the mother's.

* "Until the minors arrive at years of discretion :" in the sense of restriction, before they attain their seventeenth year. The *Ratnácara.* See Dig., vol. iv., p. 243. According to Colebrooke, sixteen years must be completed.—Elem Hin. Law, App., p. 208.

† See Annotations on the *Dáyabhága*, p. 58 ; and Digest, vol. i., p. 300.

‡ And this has been held to include the step-mother, whose right of guardianship was declared to be superior to that of the minor's paternal uncle.—Bombay Reports. vol. ii., p. 144.

Of the paternal relations.

ship of him. In default of such brother, the paternal relations generally are entitled to hold the office of guardian ; and failing such relatives, the office devolves on the maternal kinsmen, according to their degree of proximity, but the appointment of guardians universally rests with the ruling power.*

And of the maternal. Their appointment vested in the ruling power.

Guardianship of a female;

The guardianship of a female (whether she be a minor or adult) until she be disposed of in marriage, rest with her father : if he be dead, with her nearest paternal relations.† After her marriage, a woman is subjected to the control of her husband's family. In the first instance, her husband is her guardian : in default of him, her sons, grandsons, and great-grandsons are competent to assume the guardianship ; and in default of them, her husband's heirs generally, or those who are entitled to inherit his estate after her death, are competent to exercise the duties of guardian over herself and her property. On failure of her husband's heirs, her paternal relations are her guardians ; and failing them, her maternal kindred. In point of fact, females are kept in a continual state of pupilage.

during coverture,

and in widowhood.

The ruling power is the supreme guardian of all minors.

The ruling power is in every instance, whether the natural and legal guardians be living or dead, recognized to be the legitimate and supreme guardian of the property of all minors, whether male or female :‡ and it may here be mentioned, that agree-

* Dig. vol. iii., p. 544, and Elem. Hindu Law, App., p. 202.

† See App. Elem. Hindu Law, pp. 22 and 204.

‡ Thus the property of a woman, and the goods of a minor, falling into the king's power, should not be taken by him as owner : this has been already noticed. But it may be here remarked, that the property

ably to the regulations of Government, the state of minority is held to extend to the end of the eighteenth year.*

Power of guardians over the property of their wards.

As to the power of guardians over the property of their wards, I apprehend that much misconception exists. As I understand the provisions on the subject, "minors are under the protection of the law; favoured in all things which are for their benefit; and not prejudiced by any thing to their disadvantage."† It has been laid down by Sir William Jones, that "assets may be followed in the hands of any representative."‡ This is doubtless true, but a latitude has been given to the rule which the terms of it do not warrant. It has been held, I believe, that for this purpose, a guardian may be considered as the representative of the deceased: whereas it is obvious, that *quoad hoc*, he is only the representative of his successor. I understand the expression to mean, that whoever takes the assets, whether near or remote in the order of inheritance, is liable for the debts of the deceased, so far as those assets go, provided such heir have attained the age of majority; and that, where the heir is a minor, the creditor must wait until the minority expires before he can come upon the assets for the liquidation of his debts. Sub-

of a minor should be entrusted to heirs, and the rest *appointed* with his concurrence; or if the infant be absolutely incapable of discretion, with the consent of a near and unimpeachable friend, such as his mother and the rest."—See Dig., vol. iv., page 243.

* Section 2, Regulation XXVI., 1793.

† Colebrooke on Obligations and Contracts, Chap. x., §§ 585.

‡ See note to Colebrooke's Translation of *Jagannátha's* Digest, vol. p. 266.

ject to this condition, the son must pay his father's debts, as well as all necessary debts contracted on his account during his minority. And according to the Benares school, the debts of the father are binding on the son,* whether the former left property or not, as well as those of the grandfather; but he need not pay interest on the latter.

The following case arose but very lately in the Court of Sudder Dewanny Adawlut. A, a Hindu *zemindar* of Bengal, executed a deed of sale for a portion of his estate to B; B executing a separate engagement that the sale should be redeemable by re-payment of the money with interest within the term of a year. Before the term expired, the *zemindar* A died, leaving a widow and an adopted minor son, or rather a son adopted by authority, after his death, by the widow. Within a few days of the completion of the term when the sale would have become absolute and irrevocable, the widow, as guardian of the minor, borrowed money elsewhere of C, with which she paid the debt of B, and freed the land, executing to the lender a similar second sale of the same land, redeemable within a given term; which term, however, expired without re-payment on her

* But the obligation is considered only as a moral, and not a legal one, provided there are no assets. See Colebrooke, cited in App. Elm. Hindu Law, p. 347; but the same high authority has laid it down as a principle, in his Treatise on Obligations and Contracts, (Chap. ii., §§ 51,) that heirs succeed to the obligations of ancestors without any reference to the adequacy of the property, and the rights of inheritance must be relinquished, when its obligations are repudiated. And see Elem. Hindu law, App., pp. 464 and 465.

part. The question then here was, first, Could any rule of Hindu law prevent the land from becoming the property of B, on the term of the first sale expiring without repayment? Secondly, If there be no such rule, and the widow saved the land for a time by the second conditional sale, was it not a case of necessity, such as to justify her act in behalf of her ward, as clearly beneficial to him? Thirdly, If a father sell a portion of his land, with a condition for redemption, and his heir (a minor), or his guardian on his part, do not redeem, is not such land gone irrevocably? And fourthly, Do the debts of a father become payable out of his assets, even in the hands of his heir (who is a minor), on demand from the guardian? The substance of the reply of the Hindu law officers consulted on this occasion was, that no necessity for the sale had been made out, inasmuch as the estate of the deceased could not have been legally alienable for his ancestor's debts until after the minor had attained majority. Judgment was, however, given for the purchaser; and the following arguments were used on the occasion: That supposing the ancestor's conditional sale to have remained unredeemed after the expiration of the period stipulated, and the usual term of notice, the land would, of necessity, have fallen to the former creditor: That it was mere folly to urge, that the act of the mother in saving it for a time, and obtaining a further period, was not to be held good as an act evidently for the benefit of the minor, inasmuch as, but for her renewal by a fresh loan in her capacity of guardian, the conditional sale must undoubt-

Question as to the liability of a minor and of his estate during his minority.

edly have become absolute to the creditor : That according to the invariable practice of the courts, no plea of minority could be listened to, or any other doctrine recognized than that the estate of a Hindu of Bengal becomes liable at his death for the satisfaction of his just debts, especially where he has pledged his land as security for those debts, and that his power of selling outright or conditionally, any part of or all his landed property, could not be questioned : That any other doctrine would involve in confusion the acts of the court for many years past, as there was scarcely a contract of conditional sale in the provinces where that form of contract prevails, in which some out of the numerous co-sharers were not minors when the sale became absolute ; and that if their minority, in such cases, must be considered a bar to foreclosure, and cause the transaction to run on fifteen years longer, there would probably be an end to such transactions altogether, and it would not be possible to raise money at all, or at least not except on harder terms than at present : That the doctrine maintained by the court appeared to be supported by the opinion of the commentator *Jagannátha*,* and that, though there should prove to be conflicting opinions as to the law, the established usage and practice ought to prevail : And, in short, that whatever might be the real doctrine of the Hindu law on the subject, the court was bound to follow that law in matters of inheritance, marriage, caste, and religious

* See Digest, vol. i., Chap. v., on payment of debts, and particularly text 172, as translated by Mr. Colebrooke.

usages only, and not in matters of contract, of which nature the case in question appeared to be.

In answer to the above arguments, it may be observed, that supposing the minor's estate not to be liable, there did not exist any necessity for the widow's making a conditional sale. It may be assumed too, that, according to our own regulations, a mortgage would not be foreclosed against a minor, and that he would be allowed his equity of redemption on coming of age. It did not, therefore, signify whether the term of the mortgage was near expiring or not. It was at the lender's own risk to take a mortgage, in which the borrower's interest might expire before the expiration of the term.

I shall not, however, enter into any question as to the expediency or otherwise of the doctrine established in this instance, but content myself with a brief inquiry as to the law of the case, which appears quite clear, when disencumbered of the commentary of *Jagannátha*, whose authority cannot be held to be oracular or incontrovertible in any instance, especially where it is opposed by texts of unquestioned weight and indubitable import. The first text at all to the point is that of *Yajnyawalcya* (191.) It has thus been translated by Mr. Colebrooke, with a view to adapt it to the subsequent commentary of *Jagannátha*. "He who has received the estate of a proprietor, leaving no son *capable of business*, must pay the debts *of the estate*, or on failure of him, the person who takes the wife of the deceased; but not the son whose father's assets are held by another." Now here it must be

observed, that the words in *italics* are not in the original, and that the expression "capable of business" is clearly an interpolation of the commentator. The original is *rikthagrahee*, or taker of the property. In the concluding part of the text it is distinctly stated, that the son whose father's assets are held by another must not pay the debts. The next text is that of *Náreda* (172), which agreeably to *Jagannátha's* comment, has been thus translated by Mr. Colebrooke: "Of the successor to the estate, the guardian of the widow and the son *not competent to the management of affairs*, he who takes the assets becomes liable for the debts: the son, *though incompetent*, must pay the *debt*, if there be no guardian of the widow, nor a successor of the estate; and the person who took the widow, if there be no successor to the estate, nor competent son." Here the original does not mean a son incompetent from minority to manage his affairs, but a son incompetent to inherit by reason of some natural disqualification, such as blindness, disease, or the like. A son, even though incompetent to inherit, in the same manner as a son who does not inherit assets, is morally bound to pay his father's debts; and the object of the above text is to show the obligation under which he lies, if there be no successor to the estate, nor guardian of the widow. There is nothing whatever, in any text that I have been able to discover, relative to the payment of debts by a guardian. Lastly come the two texts of *Catyáyana* and *Náreda* (187 and 188). "On the death of a father, *his debt* shall in no case be paid by his sons, incapable from nonage

Authorities on the subject cited.

of conducting their own affairs; but at their full age *of fifteen years*, they shall pay it in proportion to their shares, otherwise they shall dwell hereafter in a region of horror." "Even though he be independent, a son incapable from nonage of conducting his affairs is not *immediately* liable for debts." It will be observed that *Jagannátha*, in commenting on these passages, attempts to make a distinction between minority and infancy, and infers that it is only during the latter state that a son is exempted from liability for his father's debts; but the text in the original is *apraptavyavahara*, which clearly means one who has not attained the age prescribed for the management of affairs. It follows, that where, owing to a son's minority, the father's assets are taken in charge by another person, such person cannot legally apply any portion of the assets to the payment of the father's debts; and that it is only where a person succeeds to property in his own right, that he is at liberty to pay the debts of the ancestor by means of such property. A guardian may, indeed, dispose of a portion to meet a necessity arising for the minor's subsistence; but no necessity can by possibility arise for disposing of any portion to pay the minor's father's debts, for he must cease to be a minor before he can be liable. Nor does there appear to be much of hardship in this rule. The provisions of the English law savour of much more hardship; for, according to it, real estates are not subject at all to the payment of debts by simple contract, unless made so by will. All immoveable

Conclusion, that the minor heir and his estate are not liable for the debt of his ancestor, until his majority.

property, in the Hindu law, is subject to a kind of entail; so much so, that the right of the son is equal to that of the father, supposing the property to be ancestral: and it would be hard enough, under such circumstances, that the imprudence of the father should ruin the son; for, as it is, he is bound, both legally and morally, to pay the debts: and it may be, perhaps, but just, that the period for exacting payment should be postponed until he comes to years of discretion sufficient to enable him to realize the means of satisfying the creditors with the least detriment to himself. The assets cannot in the mean time be alienated by the minor, and the creditor is ultimately sure, where assets exist, of receiving the amount of his demand with interest. Especially in a case of mortgage, where the produce of the property or usufruct might be awarded to the creditor in lieu of interest, which arrangement could not operate prejudicially to either party, or involve any breach of the Hindu law, for the usufruct of property is one species of legal interest which is called *bhogalábha*, or interest by enjoyment. The *pundits* being called upon to expound the law in a case involving a similar question* which was recently decided at Bombay, they declared that a woman who had succeeded as heir at law, to property left by her own father, cannot dispose of that property in liquidation of the debts of her husband, unless her son, having already attained the age of sixteen years, or age of discretion, shall consent to the act. This, it will be

Cases cited in confirmation of the above opinion.

* Bombay Reports, vol. i., p. 176.

observed, is a stronger case than the one above alluded to, because a son is bound to pay the debts of his father, whether he inherit assets, or not; and by this decision it was determined, that property to which he had a claim in expectancy only, could not be alienated for that purpose, until he attain the age of majority; and it was ruled also, in a case decided under the Madras presidency, that the father being dead, his son is not liable for his debts until after he has attained the age of seventeen.*

* Elem. Hin. Law, App., p. 206.

CHAPTER VIII.

OF SLAVERY.

Construction of the S. D. A. on the subject of slavery.

Slavery, among the Hindus, cannot properly be enumerated among their religious institutions. In the year 1798, the Court of Sudder Dewanny Adawlut, with reference to the long-established and sanctioned usage of slavery in these provinces, stated their opinion, "that the spirit of the rule for observing the Mahomedan and Hindu law, was applicable to cases of slavery, though not included in the letter of it." And this construction was confirmed by the Governor General in Council, on the 12th of April 1798; but it was at the same time admitted, that the rule in question is not directly and strictly applicable to questions of personal freedom and bondage.*

It will suffice, therefore, in this place, to give a general outline of the subject, which cannot be done in more comprehensive language than has been already employed by Mr. H. T. Colebrooke.† He observes, "The Hindu law fully recognizes slavery. It specifies in much detail the various modes by which a person becomes the slave of another, and which are reducible to the following heads, viz., capture in

* Harington's Analysis, note 3, p. 70, vol. i.

† Cited in Ibid. vol. iii., p. 743.

war, voluntary submission to slavery for diverse causes, (as a pecuniary consideration, maintenance during a famine, &c. ;) involuntary for the discharge of debt, or by way of punishment of specific offences ; birth, as offspring of a female slave ; gift, sale, or other transfer by a former owner ; and sale or gift of offspring by their parents. It treats the slave as the absolute property of his master, familiarly speaking of this species of property in association with cattle under the contemptuous designation of "bipeds and quadrupeds." It makes no provision for the protection of the slave from the cruelty and ill-treatment of an unfeeling master ; nor defines the master's power over the person of his slave ;* neither prescribing distinct limits to that power, nor declaring it to extend to life or limb. It allows to the slave no right of property, even in his own acquisitions, unless by the indulgence of his master. It affords no opening to his redemption and emancipation, (especially if he be a slave by birth or purchase,) unless by the voluntary manumission of him by his master, or in the special case of his saving his master's life, when he may demand his freedom,† and the portion of

Origin and condition of slavery.

* It will be seen, from the case of slavery (No. 9,) that the *pundits* of the Sudder Dewanny Adawlut, when consulted on the subject, did not hesitate to assign limits to the master's power over the person of his slave; but in the delivery of their opinion they were probably guided by reason, rather than by express law, or perhaps from the analogy of the rule with respect to servants. *Menu*, Dig. vol. ii., p 209

† But in this instance, *Jayannâtha* makes a distinction. In vol. ii., p 242, he gives the following illustration "Where a slave, neglecting his own safety, and highly valuing his master's life, rescues him

a son; or in that of a female slave bearing issue to her master, when both she and her offspring are entitled to freedom, if he have not legitimate issue; or in the particular instances of persons enslaved for temporary causes, (as debt, amercement, cohabitation with a slave, and maintenance in consideration of servitude,) on the cessation of the grounds of slavery, by the discharge of the debt or mulct, discontinuance of the cohabitation, or relinquishment of the maintenance."

Classed as personal property, with one exception.

Those slaves who correspond to the designation of *adscripti glebæ*, or hereditary serfs, and who, according to the same eminent authority,* are common in the upper provinces, are subject to the laws of ancestral real property, and cannot be transferred except under similar restrictions. Over land acquired by the grandfather, over a corrody, and over slaves employed in the husbandry, says *Yájnyawalcya*, the father and the son have equal dominion.† All other descriptions of slaves would appear to class with personal property.

Question as to the abolition of slavery.

The question of ameliorating the condition of slaves in India has not escaped the consideration of Govern-

from the encounter of a tiger or the like, and is himself preserved by the act of God; in that case he is released from slavery. But if some person attempt to destroy a man by poison, and the slave of that man discovering it, prevent him from eating the poisoned food; or if the master intended to go out of his house, not aware of a tiger standing at the door, but his slave, seeing the tiger, prevent him; in these and similar cases, it may be admitted he is not released from servitude."

* Ibid. p. 745.

† Cited in Dig., vol. ii., p. 159.

ment; but the difficulty of legislating on so delicate a subject must be obvious. Every one who has had the good fortune to be born in a state of freedom must be sensible of its invaluable blessings, and numerous arguments will occur to every mind in favour of the abolition of slavery.

That the evils of slavery are manifold, is unquestionable. That its total and immediate suppression might be followed by mischievous consequences, can admit but of as little question; while in India it must be confessed, whatever objections may be theoretically advanced to its existence, the condition of the slave himself differs in not much more than in name from that of a hired servant. Speaking of Mahomedan slavery in another place,* I observed: "In India, (generally speaking,) between a slave and a free servant there is no distinction but in the name, and in the superior indulgences enjoyed by the former: he is exempt from the common cares of providing for himself and family: his master has an obvious interest in treating him with lenity; and the easy performance of the ordinary household duties is all that is exacted in return." I have no reason to believe that the system of slavery, as it exists among the Hindus, is productive of much individual misery, however baneful its effects may be to society at large. The courts of justice are accessible to slaves as well as to freemen, and a British magistrate would never permit the plea of proprietary right to be urged in

* Prelim. Rem. Prin. and Prec. Mah. Law.

defence of oppression. If, then, but few grievances are complained of, it is fair to infer that few exist.

And as to substituting the Mahomedan for the Hindoo law in this respect.

It was one of the suggestions of the philanthropic individual* who advocated the cause of the abolition of slavery in India, that, in the event of its being deemed inexpedient to suppress the system altogether, the Mahomedan law, as being more lenient in its provisions, should be universally adopted, to the exclusion of that of the Hindus. But to the latter class, it is evident that the standard of the former would not admit of adaptation; for according to the Moosulman tenets, they only are, legally speaking, slaves, who are captured in an infidel territory in time of war, or who are the descendants of such captives. Capture in war is indeed a cause of slavery according to the Hindu law, as well as according to the Mahomedan; and perhaps among all other nations, the same cause was originally productive of the same effect. The triumph of the strong over the weak destroys the natural equality of the human condition; and to a savage mind, the persons of the conquered obviously suggest themselves as the legitimate reward of victory. To this source in all countries, may be traced the privation of freedom. But with the gradual increase of civilization, when superiority of physical force alone became less respected, other causes operated to the establishment of servitude of a more or less qualified nature: and

* Mr. J. Richardson, formerly Judge and Magistrate of Bundlekund, who in the year 1810, submitted the draft of a Regulation on the subject.

Of permanent slavery, thus, with the Hindus, besides the right accruing from conquest, and transfer implying a previously existing right, (which comprehend the *Grihajata*, or one born of a female slave in the house of her master; the *Crita*, or one bought; the *Lubdha*, or one received by donation; and the *Crumagata*, or one inherited from ancestors,) there is that species of slave termed *Atmabikrya*, or one self-sold, signifying him who for a pecuniary consideration barters his own freedom. All the slaves above enumerated, and their offspring, must be considered to be in a state of permanent and hereditary thraldom.

and temporary. There exists, besides, the state of bondage in various temporary forms, many of them differing slightly, if at all, from voluntary servitude. One who offers himself willingly as a slave, he who was won in a stake, and even a captive in war, may effect their own emancipation by offering a proper substitute.* One who enters into a state of slavery for the sake of maintenance, and he who becomes a slave for the sake of his bride, may both be restored to freedom, on relinquishing the object which induced them to part with it.† A pair of oxen is the price of emancipation to one maintained in a famine; while one relieved from a great debt, and he who has been pledged for a certain sum, or hired for a specific period of slavery, are emancipated, the two former on payment of the consideration, and the latter on

* *Náreda*, cited in Dig. vol. ii., p. 246.

† *Náreda*, cited in Dig. vol. ii., p. 247.

the expiration of the term.* An apostate from religious mendicity, is he who forsakes his duty, and deviates from the rules of the order which he has imposed on himself, as if he were to take a wife, or otherwise act like a householder,† in which case he should be condemned to a state of slavery; but it is inferrible, that the offence may be expiated by the payment of a fine.‡

Emancipation how obtainable.

From the above it will be perceived, that there are five descriptions of permanent thraldom, from which emancipation can be effected only at the will and pleasure of the master, and that four of those five are consequent on a pre-existing state of slavery. For the rest, on performance of certain conditions peculiar to each, the slave is entitled to freedom.

It must be owned, that the recognition of legal slavery in any form must tend to perpetuate its existence: but at the same time, long-established usages should be respected, especially where society has not attained such a state of civilization, as to admit of a clear perception of the general benefits intended to result from an invasion of individual rights: and so long as the legislature, in its wisdom, and from a respect for ancient institutions, shall not deem it advisable to interfere with a view to the suppression of the system, it can only be hoped that the gradual diffusion of knowledge, and the consequent spread of enlightened notions, will tend to

* *Náreda*, cited in Dig. vol. ii., pp. 243, 347.

† Dig., p. 227.

‡ Ibid. p. 229.

convince all ranks of the community, that rational liberty is the condition most conducive to the happiness and interests of mankind.*

* There are nine cases illustrative of the doctrine of slavery given in the second volume of this work. The question appears also to have been a good deal discussed in the courts subordinate to the presidencies of Madras and Bombay. See Elem. Hin. Law, App., p. 230, *et seq.*

CHAPTER IX.

OF CONTRACTS.

The principles of the Hindu law relative to contracts, are founded on the basis of good sense and equity. The same incapacitating circumstances which are the means of avoiding contracts, according to other systems, have been specified by the Hindu jurists. Thus insanity, minority, coverture, lesion, error, force, fraud, incompetency, incapacity, and revocation,* are each the cause of effecting the dissolution of obligations. To these must be added degradation, entry into a religious order,† and any predicament that operates as a civil death.

Causes of dissolving obligations.

The term insanity comprehends not only madmen and idiots, but also all those who labour under any species of fatuity, and who are naturally destitute of power to discriminate what may, and may not be done.‡

Insanity.

Minority continues until after a man has entered his sixteenth year, when he becomes acquainted with

Minority.

* *Vrihaspati*, cited in Dig. vol. ii., page 328. *Menu*, Ibid. vol. i., p. 458.

† *Vasishtha*, Ibid. vol. iii., p. 327.

‡ Dig., vol. ii., p. 187. There is a case detailed in the Bombay Reports, (vol. ii., p. 114,) in which the sale of a house by an aged, infirm, and foolish man was set aside at the suit of his wife, upon a *vyavastha* of the Hindu law officers, the price paid being proved to be inadequate, though it was not by any means established that the vender was an idiot.

affairs, or *adult in law*:* but in the Hindu law, minority is used as a term of an indefinite import, and comprehends those who are incapacitated from conducting their own affairs by extreme old age, as well as those who are incapable, owing to their extreme youth.†

Coverture.

The Hindu law recognizes the absolute dominion of a married woman over her separate and particular property, except land given to her by her husband. He has, nevertheless, power to use and consume it in case of distress; and she is subject to his control, even in regard to her separate and peculiar property.‡ It is a general rule, that coverture incapacitates a woman from all contracts; but those contracts are valid and binding which are made by wives, the livelihood of whose husbands chiefly depends on their labour;§ so also are those made for the support of the family, during the absence or disability, mental or corporeal, of the husband.‖

Lesion.

A contract, says *Menu*, "made by a person intoxicated, or insane, or grievously disorderd, or wholly dependant, by an infant, or a decrepid old man, or *in the name of another* by a person without authority, is null." In these cases, lesion may be presumed on the ground of incompetency. But among persons who are competent, the maxim of "*caveat emptor*" applies.

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* *Smriti*, cited in Dig., vol. ii., p. 115.

† Dig. vol. ii., p. 187.

‡ Colebrooke, Obl. and Con. Book 4, Ch. vi., §§ 611.

§ Dig. vol. i., p. 318; and see case 2, Chap. of Debts, vol. ii.

‖ Dig. vol. i., p. 296.

Thus, *Náreda* ordains : "A buyer ought at first himself to inspect the commodity, and ascertain what is good and bad in it ; and what after such inspection he has agreed to buy, he shall not return to the seller, '*unless it had a concealed blemish.*' "* There is indeed a provision similar to that which obtains in the Mahomedan law, giving an option of inspection ; and with respect to articles not of a perishable nature, the contract may be rescinded within ten days.† For other articles of a perishable nature, there are different periods allowed, subject to the payment of a small fine by the rescinding party.‡

A gift may be revoked, if made under a mistake ; and by analogy to this rule, every contract is vitiated by error.§ Error.

Any species of duress vitiates a contract. Thus *Jagannátha*, commenting on the text of *Náreda*, to the effect that what a man does while disturbed from his natural state of mind is void, observes : "In cases of fear and compulsion, the man is not guided solely by his own will, but solely by the will of another. If, terrified by another, he give his whole estate to any person for relieving him form apprehension, his mind is not in its natural state ; but after recovering tranquillity, if he give any thing in the form of a recompense, the donation is valid.‖ This corresponds with Force.

* Cited in Dig. vol. ii., p. 313.

† *Menu.*

‡ Dig. vol. ii., p. 321.

§ Colebrooke, Obl. and Con. Book 2, Ch. vii., §§ 102.

‖ Dig. vol. ii., p. 183.

what has been stated by Mr. Colebrooke in his Treatise on Obligations and Contracts, that though by the Hindu law all things done by force are pronounced null, yet in fact they are, in every system of jurisprudence, *voidable* rather than *void;* as they are susceptible of confirmation by assent subsequent, whether express or tacit.*

Fraud.

Under the head of fraud, it may be observed, that any fraudulent practice, (to which the word in the original, *chhala*, is synonymous,) vitiates a contract ;† and in a contract of sale, if the vender, having shewn a specimen of property free from blemish, deliver blemished property, the vendee may return it at any time, and the vender is liable to pay a fine and damages, on account of his dishonesty.‡

Incompetency.

Of incompetency to contract, where the possession and even the proprietary right exists, there are frequent instances. The most familiar is that of a coparcener, who is prohibited from giving, mortgaging, or selling his own share of the immoveable estate, except at a time of distress, for the support of his household.§ According to the law, however, as current in Bengal, the contract, though not valid so far as regards the shares of the other parceners, is valid so far as regards the seller's own share.‖ And not only are the survivors answerable for a debt contract-

* Ch. vii., §§ 109.

† Ibid.

‡ *Catyáyana* and *Náreda*, cited in Dig. vol. ii., pp. 323, 325.

§ *Vyása*, cited in Dig. vol. iii., p. 433.

‖ Ibid, p. 434.

ed by their deceased partner, if the sum borrowed was applied to their use; but, according to *Menu*, "should even a slave make a contract in the name of his absent master for the behoof of the family, that master, whether in his own country or abroad, shall not rescind it." A similar prohibition extends to the case of widows on whom the property of their husbands has devolved, and who are declared incompetent to alienate, except for special purposes; and in a case recently adjudicated, where the heirs of a person deceased refused payment of a bond contracted by his widow (also dead), and in which it was proved that part of the amount was expended in payment of her husband's debts, it was held, that the heirs were liable for so much of the amount as had been so laid out, but that the widow could not saddle the estate or the heirs with any unnecessary burthen;* and it has been laid down as a general principle by Mr. Colebrooke, that the head of a family is answerable for necessaries supplied for the indispensable use of it, and for the subsistence of the persons whom he is bound to maintain, whether it be his wife, his parent, his child, his slave, his servant, his pupil, or his apprentice to whom the necessaries are furnished, and goods indispensably requisite are delivered.†

Incapacity.

In recapitulating the causes of incapacity, *Yájnyawalcya* observes: "A contract made by a person

* *Vyása*, cited in Dig. vol. iii., p. 201.

† Obl. and Con. Book 2, §§ 49.

intoxicated, or insane, or grievously disordered or disabled, by an infant, or a man agitated by fear or the like, or in the name of another by a person without authority, is utterly null." Upon the above passage *Jagannátha* thus comments: "Singly the gift of wages of a man possessing his senses is valid; joined with madness or the like, the intentional payment of wages during a lucid interval may also be valid; but singly a gift by a man affected by insanity or the like is void." From this comment the principle may be deduced, that the act of a lunatic may be effectual, if the contract be onerous and the agreement rational, on the presumption of the act having been done during a lucid interval; but that where it may be prejudicial to him, and unattended with any benefit, it should be held to be *ipso facto* void: so also the validity of a deed executed by a man in his last illness should be upheld, if it be proved that he was of sound mind at the time of its execution; but otherwise, if it appear that his mind was not in its natural state.

This point was ruled by the Sudder Dewanny Adawlut, in a suit by a Hindu widow against the brothers of her husband, who died childless; to which the defendants pleaded a conveyance from the brother to them, executed during mortal sickness, four days before he died; and it was held, that in law, the only question was, whether in point of fact he was of sound mind at the time.*

* Case of Radhamunee Debia, *v.* Shamchunder and Rooderchunder, S. D. A. Reports, vol. i., p. 85, new ed., p. 113.

Revocation.

Eight gifts, according to *Catyáyana*, are not subject to revocation or retraction: What has been given as wages, as the price of an entertainment, as the price of goods sold, as a nuptial gift to a bride or her family, as an acknowledgment to a benefactor, as a present to a worthy man, from natural affection, or from friendship.* *Harita* declares: "A promise *legally* made in words, but not performed in deed, is a debt of conscience, both in this world and the next; but where a promise has been made, or a thing given, to a person whom the law declares incapable of receiving, or where it has been given for a consideration unperformed, the law permits the non-performance of the promise in the one case, and the revocation in the other.† It is a general rule, that in the case of a pledge, a gift, or a sale, the prior contract has the greatest force, and that in all other contested matters the latest act shall prevail.‡

The liquidation of debts is rigorously enjoined: for instance, it is provided that sons must pay the debt of their father, when proved, as if it were their own, that is, with interest, and whether they have inherited assets or not.—The son's son must pay the debt of his grandfather, but without interest; and his son, that is, the great-grandson, shall not be compelled to discharge the debt, unless he be heir and have assets.§ The reason of this last-mentioned distinc-

* Dig. vol. ii., p. 174.

† Dig. vol. ii., p. 171.

‡ *Yájnyawalcya*, cited in Dig. vol. i., p. 477.

§ Dig. vol. i., p. 266. According to Sir William Jones, where there

What contracts are binding on representatives.

tion is not very obvious, nor does it appear why the equitable principle of rendering assets requisite to responsibility should be limited to the great-grandson alone. But in all cases, the liability extends only to just and reasonable debts. Hindu gifts are not binding on representatives: and in a case where a person contracted to pay to another a sum of money in consideration of that person's giving his daughter in marriage to the son of the contracting party, it was held that the contract was not binding after his death; the law not permitting money to be given for a bride, and the consideration consequently not being a legal one:* and it should be observed, that in all such cases the turpitude is considered to be on the side of the receiver, the giver not being deemed to have seriously intended to give.†

I deem it wholly superfluous to enter into further disquisition relative to the law of contracts, bailment, or other matters connected with judicial proceedings. They who are desirous of further information on this head, and other miscellaneous matters, should consult the "Elements of Hindu Law," which contains an epitome of the law of Contracts, and "Considerations on the Hindu Law, as current in Bengal," in which will be found a compilation of the principal rules connected with the subject. Were any outline of the subjects alluded to attempted in this place, the result

are no assets, the son and grandson are under a moral and religious, but not a civil, obligation to pay the debts. See note to Ibid.

* Bom. Rep., vol. ii., p. 194.

† Obl. and. Con. Book 2, §§ 124.

would probably be a repetition, in substance, of what has been laid down by the above-mentioned authorities. The rules connected with the law of evidence are few and simple. The testimony of any person interested in the case is not admissible. Various descriptions of incompetent witnesses are enumerated, and much is left to the discretion of the judge with respect to the credit which should be attached to testimony. In the last resort, discovery may be had by compelling a defendant to make oath, or by ordeal.—On the subject of evidence, it will be perceived that one or two cases have been propounded to the Hindu law officers in the *mofussil* courts: but with reference to this and other topics connected with judicial proceedings generally, I beg to refer to the following chapters. M.

The portion of Mr. Macnaghten's Hindu Law which contains the subjects of the Administration of Justice, viz., Constitution of a Judicial Assembly, Evidence, &c., has been omitted, as the same has been already published in my edition of the *Mitácshará*, and is out of place in an Elementary work like the present.—The same was omitted likewise in Mr. Wilson's Edition of Hindu Law. G.

PRINCIPLES

OF

MAHOMEDAN LAW.

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PRINCIPLES

OF

MAHOMEDAN LAW.

CHAPTER I.

PRINCIPLES OF INHERITANCE.

SECTION I.

GENERAL RULES.

Property of all kinds inheritable without distinction.

1. THERE is no distinction between real and personal, nor between ancestral and acquired property, in the Mahomedan Law of Inheritance.

Of primogeniture.

2. Primogeniture confers no superior right. All the sons, whatever their number, inherit equally.

Of the right of a daughter, with a son.

3. The share of a daughter is half the share of a son, whenever they inherit together.

Of legacies in favour of heirs.

4. A will made in favour of one son, or of one heir, cannot take effect to the prejudice and without the consent of the other sons, or the other heirs.

Of debts and legacies.

5. Debts are claimable before legacies, an legacies (which however cannot exceed one-third of the testa-

tor's estate) must be paid before the inheritance is distributed.

Causes of exclusion from inheritance.

6. Slavery, homicide, difference of religion, and difference of allegiance, exclude from inheritance.

Exceptions.

7. But persons not professing the Mahomedan faith may be heirs to those of their own persuasion, and in the case of persons who are of the Mahomedan faith, difference of allegiance does not exclude from inheritance.

Simultaneous succession of a plurality of heirs.

8. To the estate of a deceased person, a plurality of persons, having different relations to the deceased, may succeed simultaneously, according to their respectively allotted shares, and inheritance may partly ascend lineally, and partly descend lineally at the same time.

No right by representation.

9. The son of a person deceased shall not represent such person if he died before his father. He shall not stand in the same place as the deceased would have done had he been living, but shall be excluded from the inheritance, if he have a paternal uncle. For instance, A, B and C are grandfather, father and son. The father B dies in the life-time of the grandfather A. In this case the son C shall not take *jure representationis*, but the estate will go to the other sons of A.

Sons, son's sons, &c. have no specific allotments; but their portions vary according to the number of the other heirs.

10. Sons, son's sons, and their lineal descendants, in how low a degree soever, have no specific share assigned to them: the general rule is that they take all the property after the legal sharers are satisfied, unless there are daughters; in which case each daughter takes a share equal to half of what is taken

by each son. For instance, where there are a father, a mother, a husband, a wife and daughters, but little remains as the portion of the sons; but where there are no legal sharers nor daughters, the sons take the whole property.

Enumeration of heirs not liable to exclusion.

11. Parents, children, husband and wife must, in all cases, get shares, whatever may be the number or degree of the other heirs.

General rule for the shares of brothers and sisters.

12. It is a general rule that a brother shall take double the share of a sister. The exception to it is in the case of brothers and sisters by the same mother only, but by different fathers.

Of sharers who are not residuary heirs.

13. The portions of those who are legal sharers only, and not residuary heirs, can be stated determinately, but the portions receivable by those who are both sharers and residuaries cannot be stated generally, and must be adjusted with reference to each particular case. For instance, in the case of a husband and wife, who are sharers only, their portion of the inheritance is fixed for all cases that can occur; but in the case of daughters and sisters who are, under some circumstances, legal sharers, and under other residuaries, and in the case of fathers and grandfathers who are, under some circumstances, legal sharers only, and under others, residuaries also, the extent of their portions depends entirely upon the degree of relation of the other heirs and their number.*

Of sharers who are residuary heirs.

* Daughters without sons are legal sharers, and so are sisters without brothers, but with them they become merely residuaries. Grandfathers and fathers with sons, son's sons, &c. are legal sharers, but, with daughters only, they are residuaries, as well as legal sharers.

SECTION II.

OF SHARERS AND RESIDUARIES.

Share of the widow.

14. The widow takes an eighth of her husband's estate, where there are children or son's children, how low soever, and a fourth where there are none.

Share of the husband.

15. The husband takes a fourth of his wife's estate, where there are children or son's children, how low soever, and a moiety where there are none.

Share of the daughter.

16. Where there is no son and there is only one daughter, she takes a moiety of the property as her legal share.

Share of two or more daughters.

17. Where there is no son, and there are two or more daughters, they take two-thirds of the property as their legal share.

Share of the son's daughters.

18. Where there is no son, nor daughter, nor son's son, the son's daughters take as the daughters, namely, a moiety is the legal share of one, and two-thirds of two or more.

Of the same.

19. Where there is one daughter, the son's daughters take a sixth, but where there are two or more daughters, they take nothing.

Of the same.

20. Where there is a son's son, however, or a son's grandson, the son's daughters take a share equal to half of what is allotted to the grandson or great-grandson.

Of brothers and sisters.

21. Brothers and sisters can never take any share of the property, where there is a son or son's son, how low soever, or a father or grandfather.*

* It is the orthodox opinion that the grandfather excludes brethren of the whole blood and those by the same father only. Among the *Schias*, who adhere to the doctrine of the two disciples, the contrary

22. Where there are uterine brothers, the sisters each take a share equal to half of what is taken by the brothers; and they being then residuaries, the amount of their shares varies according to circumstances. Of the same.

23. In default of sons, son's sons, daughters and son's daughters, where there is only one sister and no uterine brother, she takes a moiety of the property. Of the same.

24. In default of sons, son's sons, daughters and son's daughters, where there are two or more sisters and no uterine brother, they take two-thirds of the property. Of the same.

25. Where there are daughters or son's daughters and no brothers, the sisters take what remains after the daughters or son's daughters have realised their shares: such residue being half, should there be only one daughter or son's daughter, and one-third should there be two or more. Of the same.

26. A distinction is made between the two descriptions of half brothers and half sisters. Half brothers and half sisters, who are by the same father only, can never inherit a half brother's estate while there are both brothers and sisters by the same father and mother, but those by the same mother only, do inherit with brethren of the whole blood. Of half brothers and half sisters. Of those by the same father only. Of those by the same mother only.

27. Where there is only one sister by the same father and mother, the half sisters by the same father only, supposing them to have no uterine brother, take one-sixth as their legal shares. Of half sisters by the same father only.

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opinion is maintained. The terms "grandfather" and "grandmother" are intended to include all ancestors, in whatever degree of ascent, between whom and the deceased no female intervenes.

Of the same

28. Where there are two or more sisters by the same father and mother, the half sisters by the same father only, supposing them to have no uterine brother, take nothing.

Of the same.

29. Where, however the half sisters by the same father only, have an uterine brother, they each take a share equal to half of what is allotted to him.

Brothers and sisters by the same mother only inherit equally; but the general rule of a double share for the male applies to their issue.

30. Among brothers and sisters by the same mother only, difference of sex makes no distinction in the amount of the shares, contrary to the case of brothers and sisters by the same father and mother, and brothers and sisters by the same father only; but the general rule of a double share to the male applies to their issue.

Of a half brother and a half sister by the same mother.

31. Where there is one brother by the same mother only, or one sister by the same mother only, his or her share is one-sixth, provided there are no children of the deceased, nor son's children, nor father, nor grandfather, and where there are two or more children by the same mother only, their share is one-third.

Of two or more.

Of the father.

32. Where there is a son of the deceased, or son's son, how low soever, the father will take one-sixth.

Of the mother.

33. Where there are children, or son's children, how low soever, or two or more brothers and sisters, the mother will take one-sixth.

Of the same.

34. Where there are no children, nor son's children, and only one brother or sister, the mother will take one-third with a widow or a widower, if she have a grandfather to share with instead of a father; but a third of the remainder only, after the shares of

the widow or widower have been satisfied, if there be a father to share with her.

35. Grandfathers can never take any share of the property where there is a father. Of the grandfather.

36. Where there is a son of the deceased or son's son, how low soever, and no father, the grandfather will take one-sixth. Share of.

37. Grandmothers can never take any share of the property where there is a mother, nor can paternal grandmothers inherit where there is a father. Of the grandmother.

38. Paternal female ancestors of whatever degree of ascent are also excluded by the grandfather, except the father's mother; she not being related through the grandfather. Of paternal female ancestors. Exception.

39. The share of a maternal grandmother is one-sixth, and the same share belongs to the paternal grandmother where there is no father. Share of grandmother.

40. Two or three grandmothers being of equal degree, share the sixth equally. Of two or more grandmothers.

41. But grandmothers who are nearer in degree to the deceased, exclude those who are more distant. The nearer exclude the more distant.

42. A maternal grandfather and the mother of a maternal grandfather are not entitled to any specific share, they being termed false ancestors, and not included in the number of sharers or residuaries. Of false ancestors.

SECTION III.

OF DISTANT KINDRED.

43. Where there is no son, nor daughter, nor son's son, nor son's daughter, however low in descent,

nor father, nor grandfather, nor other lineal male ancestor, nor mother, nor mother's mother, nor father's mother, nor other lineal female ancestor, nor widow, nor husband, nor brother of the half or whole blood, nor sons, how low soever, of the brethren of the whole blood or of those by the same father only, nor sister of the half or whole blood, nor paternal uncle, nor paternal uncle's son, how low soever, (all of whom are termed either sharers or residuaries,)* the daughter's children and the children of the son's daughters succeed; and they are termed the first class of distant kindred.

Of the first class of distant kindred.

Of the second class.

44. In default of all those above enumerated, the grandfathers and grandmothers of that description, who are neither sharers nor residuaries, succeed; and they are termed the second class of distant kindred.

Of the third class.

45. In their default the sister's children, and the brother's daughters, and the sons of the brothers by the same mother only, succeed; and they are termed the third class of distant kindred.

Of the fourth class.

46. In their default the paternal aunts and uncles by the same mother only, and maternal uncles and

* Of the persons here enumerated the following males are legal sharers, namely, the father, the grandfather or other lineal male ancestor, the husband and the brother of the half blood by the same mother only, and the following females, namely, the daughter, the son's daughter, the widow, the mother, the grandmother, the sister by the same father and mother, the sister by the father only, and the sister by the same mother only. The shares of these persons vary according to circumstances, and in particular instances, some of them (as has been shown) are liable to exclusion altogether. The rest of the persons enumerated are residuaries only, and have no specific shares.

aunts succeed; and they are termed the fourth class of distant kindred.

Of their children.

47. In their default the cousins, that is, the children of paternal aunts and uncles by the same mother only, and of maternal uncles and aunts succeed.

Exception in the case of an enfranchised slave.

48. There is an exception to the above general rules, relative to the succession of distant kindred after residuaries. If the estate to be inherited belonged to an enfranchised slave, his manumittor and the heirs of such manumittor inherit, in preference to the distant kindred of the deceased.

Rules for the succession of the first class.

49. The rule with regard to the succession of the first class of distant kindred is, that they take according to proximity of degree, and when equal, those who claim through an heir have a preference to those who claim through one not being an heir. For instance, the daughter of a son's daughter and the son of a daughter's daughter are equidistant in degree from the ancestor; but the former shall be preferred, by reason of the son's daughter being an heir, and the daughter's daughter not being an heir: if there should be a number of these descendants of equal degree, and all on the same footing with respect to the persons through whom they claim, but the sexes of the ancestors differ in any stage of ascent the distribution will be made with reference to such difference of sex; regard being had to the stage at which the difference first appeared: for instance, the two daughters of the daughter of a daughter's son will get twice as much as the two sons of a daughter's daughter's daughter; because one of the ances-

tors of the former was a male, whose portion is double that of a female.*

For the succession of the second class.

50. The succession also, with regard to the second class of distant kindred, is regulated nearly in the same manner, by proximity, and by the condition and sex of the person through whom the succession is claimed when the claimants are related on the same side; when the sides of relation differ, two-thirds go to the paternal, and one to the maternal side, without regard to the sex of the claimants.†

For the succession of the third class.

51. The same rules apply with regard to the third as to the first class of distant kindred; for instance, the brother's son's daughter and the sister's daughter's son are equidistant in the degree from the ancestor; but the former shall be preferred by reason of the brother's son being a residuary heir, and where they are equal in this respect the rule laid down for the first class is applicable to this.

For the succession of the fourth class.

52. With regard to the fourth class all that need be said is, that (the sides of relation being equal) un-

* The opinion of *Aboo Yoosuf* is that where the claimants are on the same footing with respect to the persons through whom they claim, regard should be had to the sexes of the claimants and not to the sexes of their ancestors. But this, although the most simple, is not the most approved rule.

† The rule may be thus exemplified. The claimants being a maternal grandfather and the mother of a maternal grandfather, the former being more proximate excludes the latter; but suppose them to be the father of a maternal grandfather and the mother of a maternal grandfather: here the claimants are equal in point of proximity; the side of their relation is the same and they are equal with respect to the sex of the person through whom they claim, and in this case the only method of making the distribution is by having regard to the sexes of the claimants and by giving a double share to the male.

cles and aunts of the whole blood are preferred to those of the half, and those who are connected by the same father only are preferred to those by the same mother only. Where the strength of relation is also equal, as, for instance, where the claimants are a maternal uncle and a maternal aunt, of the whole blood, then the rule is, that the male shall have a share double that of the female. Where however one claimant is related through the father only, and the other is related through the mother only, the claimant related through the father shall exclude the other if the sides of their relation are the same ; for instance, a maternal aunt by the same father only, will exclude a maternal aunt by the same mother only ; but if the sides of their relation differ ; for instance, if one of the claimants be a paternal aunt by the same father and mother, and the other be a maternal aunt by the same father only, no exclusive preference is given to the former, though she obtains two shares in virtue of her paternal relation.

For the succession of their children.

53. The succession of the children of the above class, that is, the cousins, is regulated by the following rules :—propinquity to the ancestor is the first rule. Where that is equal, the claimant through an heir inherits before the claimant through one not being an heir, without respect to the sex of the claimants ; for instance, the daughter of a paternal uncle succeeds in preference to the son of a paternal aunt—unless the aunt is related on both the father's and mother's sides, and the relation of the uncle be by the same mother only. But where the son of a paternal aunt

by the same father and mother, and the son of a maternal aunt by the same father and mother, or by the same father only, claim together, the latter will not be excluded by the former; the only difference is, that two-thirds are the right of the claimant on the paternal side, and one-third that of the claimant on the maternal side. Should there be no difference between the strength of relation, the sides or the sexes of the persons through whom they claim, regard must be had to the sexes of the claimants themselves.

For the succession of the descendants of their children.

54. In the distribution among the descendants of this class, the same rule is applicable as to the descendants of the first class; for instance, the two daughters of the daughter of a paternal uncle's son will get twice as much as the two sons of the daughter of a paternal uncle's daughter, supposing the relation of the uncles to be the same, and in case of equality in all other respects regard must be had as above, to the sexes of the claimants.*

Of those who succeed in default of distant kindred.

55. In default of distant kindred, he has a right to succeed whom the deceased ancestor acknowledged conditionally, or unconditionally, as his kinsman: provided the acknowledgment was never retracted,

* In considering the doctrine of succession of distant kindred, attention must be paid to the following points. First, their relative distance in degree of relation from the deceased, whether a greater or lesser number of degrees removed. Secondly, it must be ascertained whether any of the claimants are the children of heirs. If so, preference must be shown to such children. Thirdly, their strength of relation, whether they are of the half or whole blood. Fourthly, their sides of relation whether connected by the father's or mother's side. And Fifthly, the sexes of the persons through whom they claim, whether male or female. With respect to this latter point, however, a difference of opinion exists;

and provided it cannot be established that the person in whose favour the acknowledgment was made belongs to a different family.

56. In default of all these, there being no will, the property will escheat to the public treasury ; but this only where no individual has the slightest claim.

Of the public treasury.

SECTION IV.

PRIMARY RULES OF DISTRIBUTION.

57. Where there are two claimants, the share of one of whom is half, and of the other a fourth, the division must be made by four ; as in the case of a husband and an only daughter, the property is made into four parts, of which the former takes one and the latter two. The remaining fourth will revert to the daughter.

Rule where the shares are a half and a fourth.

58. Where there are two claimants, the share of one of whom is half, and of the other an eighth, the division must be made by eight ; as in the case of a wife and a daughter, the property is made into eight parts, of which the daughter takes four and the wife one. The surplus three shares revert to the daughter.

A half and an eighth.

59. No case can occur of two claimants, the one entitled to a fourth and the other to an eighth ; nor

A half, a fourth and an eighth cannot occur together.

it being maintained by some authorities that *cæteris paribus* no regard should be had to the mere sex of the person through whom the claim is made, but that the adjustment should be made according to the sex of the claimants themselves. But the contrary is the more approved doctrine. It should be recollected too, that, whenever the sides of relation differ, those connected through the father are entitled to twice as much as those connected through the mother, whatever may be the sexes of the claimants.

of three claimants, the one entitled to half, the other to a fourth, and the third to an eighth.

A sixth and a third.

60. Where there are two claimants, the share of one of whom is one-sixth, and of the other one-third; as in the case of a mother and father being the only claimants, the property is made into six parts, of which the mother takes two and the father one as his legal share. The surplus three shares revert to the father.

A sixth and two-thirds.

61. Where there are two claimants, the share of one of whom is one-sixth, and of the other two-thirds; as in the case of a father and two daughters being the only claimants, the property is made into six parts, of which the father takes one as his legal share, and the two daughters four. The surplus share reverts to the father.

A third and two-thirds.

62. Where there are two claimants, the share of one of whom is one-third, and of the other two-thirds; as in the case of a mother and two sisters, the property is made into three parts, of which the mother takes one and the two sisters two.

A sixth, a third, and two-thirds cannot occur together.

63. No case can occur of three claimants, the one entitled to one-sixth, the other to one-third, and the other to two-thirds.

A half with a sixth, a third, or two-thirds.

64. Where a husband inherits from his childless wife, (his share in this case being one-half,) and there are other claimants entitled to a sixth, a third, or two-thirds, such as a father, a mother, or two sisters, the division must be by six.

A fourth with a sixth, a third, or two-thirds.

65. Where a husband inherits from his wife who leaves children, or a wife from her childless husband,

(the shares of these persons respectively in these cases being one-fourth,) and there are other claimants entitled to one-sixth, one third, or two-thirds, the division must be by twelve.

An eighth with a sixth, a third, or two-thirds.

66. Where a wife inherits from her husband, leaving children, her share in that case being one-eighth, and there are other claimants entitled to one-sixth, one-third, or two-thirds, the division must be by twenty-four.

Of the increase of six.

67. Where six is the number of shares into which it is proper to distribute the estate, but that number does not suit to satisfy all the sharers without a fraction, it may be increased to seven, eight, nine, or ten.

Of twelve.

68. Where twelve is the number, and it does not suit, it may be increased to thirteen, fifteen, or seventeen.

Of twenty-four.

69. Where twenty-four is the number, and it does not suit, it may be increased to twenty-seven.

SECTION V.

RULES OF DISTRIBUTION AMONG NUMEROUS CLAIMANTS.

Equal numbers.

70. Numbers are said to be *mootumasil*, or equal, where they exactly agree.

Concordant.

71. They are said to be *mootudakhil*, or concordant, where the one number being multiplied, exactly measures the other.

Composit.

72. They are said to be *mootuwafiq*, or composit, where a third number measures them both.

Prime.

73. They are said to be *mootubayun*, or prime, where no third number measures them both.

Principles of distribution.

74. There are seven rules of distribution, the first three of which depend upon a comparison between the number of the heirs and the number of the shares; and the four remaining ones upon a comparison of the numbers of the different sets of heirs, after a comparison of the number of each set of heirs with their respective shares.

First principle.

75. The first is when, on a comparison of the number of the heirs and the number of shares, it appears that they exactly agree, there is no occasion for any arithmetical process. Thus, where the heirs are a father, a mother, and two daughters, the share of the parents is one-sixth each, and that of the daughters two-thirds. Here, according to principle 61, the division must be by six; of which each parent takes one, and the remaining four go to the two daughters.

Second principle.

76. The second is when, on a comparison of the number of the heirs and the number of shares, it appears that the heirs cannot get their portions without a fraction, and that some third number measures them both, when they are termed *mootuwafiq*, or composit; as in the case of a father, a mother, and ten daughters. Here according to principle 61, the division must be by six. But when each parent has taken a sixth, there remain only four to be distributed among the ten daughters, which cannot be done without a fraction; and on a comparison of the number of heirs who cannot get their portions without a fraction, and the number of shares remaining for them, they appear to be composit, or agree in two. In this case the rule is, that half the number of such heirs, which is

5, must be multiplied into the number of the original division 6, thus $5 \times 6 = 30$; of which the parents take ten or five each, and the daughters twenty or two each.

77. The third is when, on a comparison of the number of the heirs and the number of shares, it appears that the heirs cannot get their portions without a fraction, and that there is one over and above between the number of such heirs, and the number of shares remaining for them. This is termed *mootubayun*, or prime, as in the case of a father, a mother, and five daughters. Here also according to principle 61 above quoted, the division must be by six. But when each parent has taken a sixth, there remain only four to be distributed among the five daughters, which cannot be done without a fraction, and on a comparison of the number of heirs who cannot get their portions without a fraction, and the number of shares remaining for them, they appear to be *mootubayun*, or prime. In this case the rule is, that the whole number of such heirs, which is five, must be multiplied into the number of the original division. Thus $5 \times 6 = 30$; of which the parents take ten or five each, and the daughters twenty or four each. Third principle.

78. The fourth is when, on a comparison of the different sets of heirs, it appears that one or more sets cannot get their portions without a fraction, and that all the sets are *mootumasil*, or equal, as in the case of six daughters, three grandmothers, and three paternal uncles; in which case according to principle 61, the division must be by six. Here in the first Fourth principle.

instance, a comparison must be made between the several sets and their respective shares. The share of the daughters is two-thirds, but two-thirds of six is 4, and 4 compared with the number of daughters 6, is *mootuwafiq*, or composit, agreeing in two. The share of the three grandmothers is one-sixth, but one-sixth of six is 1, and 1 compared with the number of grandmothers is *mootubayun*, or prime. The remaining share which is one, will devolve on the three paternal uncles; but one compared with three is also *mootubayun*, or prime.

Then the rule is, that the sets of heirs themselves must be compared with each other, by the whole where it appears that they were *mootudakhil*, or concordant; or *mootubayun*, or prime; and by the measure where it appears that they were *mootuwafiq*, or composit, and if agreeing in two by half. In the instance of the daughters, the result of the former comparison was, that they agreed in two; consequently the half of their number must be compared with the whole number of the grandmothers and of the uncles, in whose cases the comparison showed a prime result. Thus $3 = 3$ and $3 = 3$, which being *mootumasil*, or equal, the rule is, that one of the numbers be multiplied into the number of the original division. Thus $3 \times 6 = 18$, of which the daughters will take (two-thirds) twelve, or two each; the grandmothers will take (a sixth) three, or one each, and the paternal uncles will take the remaining three or one each.

Fifth principle.

79. The fifth is when, on a comparison of the different sets of heirs, it appears that one or more

sets cannot get their portions without a fraction, and that the sets are *mootudakhil*, or concordant; as in the case of 4 wives, 3 grandmothers, and 12 paternal uncles. In this case, according to principle 65, the division must be by twelve. Here in the first instance, a comparison must be made between the several sets and their respective shares. Thus the share of the four wives is one-fourth; but the fourth of twelve is 3, and 3 compared with the number of wives is *mootubayun*, or prime. The share of the three grandmothers is one-sixth; but the sixth of twelve is 2, and 2 compared with the number of grandmothers is also prime.

The remaining shares, which are seven, will devolve on the twelve paternal uncles; but 7 compared with 12 is also prime.

Then the rule is, that the sets of heirs themselves must be compared, the whole of each with the whole of each, as the preceding results show that they are prime, on a comparison of the several heirs with their respective shares. Thus $4 \times 3 = 12$, and $3 \times 4 = 12$, which being concordant, the one number measuring the other exactly, the rule is, that the greater number must be multiplied into the number of the original division. Thus $12 \times 12 = 144$; of which the wives will get (one-fourth) thirty-six, or nine each, the grandmothers (a sixth) twenty-four, or eight each, and the paternal uncles the remaining eighty-four, or seven each.

80. The sixth is when, on a comparison of the different sets of heirs, it appears that one or more Sixth principle.

sets cannot get their portions without a fraction, and that some of the sets are *mootuwafiq*, or composit, with each other; as in the case of four wives, eighteen daughters, fifteen female ancestors, and six paternal uncles; in which case, according to principle 66, the original division must be by 24. Here in the first place, a comparison must be made between the several sets and their respective shares. Thus the share of the four wives is an eighth; but an eighth of 24 is 3, and three compared with the number of wives is *mootubayun*, or prime. The share of the eighteen daughters is two-thirds; but two-thirds of 24 is 16, and 16 compared with the number of daughters 18, is composit, and they agree in 2. The share of the fifteen female ancestors is one-sixth; but a sixth of 24 is 4, and 4 compared with the number of female ancestors 15, is prime. The remaining share, which is one, will devolve on the six paternal uncles as residuaries; but one and six are prime.

Then the rule is, that the sets of heirs themselves must be compared; by the whole where the preceding result shows that they were prime, and by their measure, where it shows that they were composit. Thus $4 \times 2 = 9-1$, which being prime, the one number must be multiplied by the other. This result must then be compared with the whole of the third set; because the preceding result shows that set to have been prime. Thus $15 \times 2 = 36-6$ and $6 = 15-9$ and $6 = 9-3$, which agreeing in 3, the third of one number, must be multiplied into the whole of the other. This result must also be compared with the

whole of the fourth set; because the preceding result shows that set to have been prime. Thus $6 \times 30 = 180$, which being concordant, or agreeing in six, the sixth of one number must be multiplied into the whole of the other, but as it is obvious that by this process the result would still be the same, multiplication is needless. Then this result must be multiplied into the number of the original division. Thus $180 \times 24 = 4320$, of which the four wives will get an eighth, five hundred and forty, or one hundred and thirty-five each; the eighteen daughters two-thirds, two thousand eight hundred and eighty, or one hundred and sixty each; the female ancestors one-sixth, seven hundred and twenty, or forty-eight each; and the paternal uncles the remaining one hundred and eighty, or thirty each.

Seventh principle.

81. The seventh and last is when, on a comparison of the different sets of heirs, it appears that all the sets are *mootubayun*, or prime, and no one of them agrees with the other; as in the case of two wives, six female ancestors, ten daughters, and seven paternal uncles. Here according to principle 66, the original division must be by 24.

In the first instance, a comparison must be made between the several sets of heirs and their respective shares. Thus the share of the two wives is one-eighth; but the eighth of 24 is 3, and 3 compared with the number of wives is prime. The share of the six female ancestors is one-sixth; but the sixth of 24 is 4, and 4 compared with the number of female ancestors, is composit, or agrees in 2. The share of the

ten daughters is two-thirds; and two-thirds of 24 is 16, and 16 compared with the number of daughters is also composit, or agrees in 2. The remaining share, which is one, will devolve on the seven paternal uncles; but 1 and 7 are prime.

Then the rule is, that the sets of heirs themselves must be compared; by the whole where the preceding result shows that they were prime, and by the half or other measure, where it shows that they were composit. Agreeably to this rule the whole of the first set of heirs must be compared with half of the second: thus $2 = 3-1$, which numbers being prime must be multiplied into each other. Then the result must be compared with the half of the next set, the former result here also having agreed in 2. Thus $5 = 6-1$, which being prime, must be multiplied into each other. Then the result must be compared with the whole of the next set, the former result here having been prime. Thus $7 \times 4 = 30-2$ and $2 \times 3 = 7-1$, which being also prime, must be multiplied into each other. Thus $30 \times 7 = 210$, in which case the rule is, that this last product must be multiplied into the number of the original division. Thus $210 \times 24 = 5040$, of which the wives will take an eighth, six hundred and thirty, or three hundred and fifteen each; the female ancestors a sixth, eight hundred and forty, or one hundred and forty each; the daughters two-thirds, three thousand three hundred and sixty, or three hundred and thirty-six each; and the paternal uncles the remaining two hundred and ten, or thirty each.

Rule for ascertaining the shares of different sets of heirs.

82. When the whole number of shares, into which an estate should be made, has been found, the mode of ascertaining the number of portions to which each set of heirs is entitled, is to multiply the portions originally assigned them, by the same number by which the aggregate of the original portions was multiplied; as an easy example of which rule the following case may be mentioned. There are a widow, eight daughters, and four paternal uncles; the shares of the two first sets being one-eighth and two-thirds, the estate, according to principle 66, must be made originally into 24 parts, of which the widow is entitled to 3, the daughters to 16, and there remain 5 to be divided among the four paternal uncles, but which cannot be done without a fraction. Here the proportion between the shares and the heirs who cannot get their portions without a fraction, must be ascertained, and $4 = 5 - 1$, being prime, the rule is, (see No. 77,) to multiply the number of the original division by the whole number of the heirs so situated. Thus $24 \times 4 = 96$. Here to find the shares of each set multiply what each was originally declared entitled to, by the number by which the aggregate of all the original portions was multiplied. Thus $3 \times 4 = 12$, the share of the widow; $16 \times 4 = 64$, the share of the daughters; and $5 \times 4 = 20$, the share of the paternal uncles.

Rule for ascertaining the shares of each individual of the different sets of heirs.

83. To find the portion of each individual in the several sets of heirs, ascertain how many times the number of persons in each set may be multiplied into the number of shares ultimately assigned to each set.

Thus $8 \times 8 = 64$, and $5 \times 4 = 20$. Here eight will be the share of each daughter, and four the share of each paternal uncle, which, with the twelve which formed the share of the widow, will make up the required number ninety-six.

SECTION VI.

OF EXCLUSION FROM AND PARTIAL SURRENDER OF INHERITANCE.

Two descriptions of exclusion.

84. Exclusion is either entire or partial. By entire exclusion is meant, the total privation of right to inherit. By partial exclusion is meant, a diminution of the portion to which the heir would otherwise be entitled. Entire exclusion is brought about by some of the personal disqualifications enumerated in principle (6,) or by the intervention of an heir, in default of whom a claimant would have been entitled to take, but by reason of whose intervention he has no right of inheritance.

Explanation of.

In what case an entirely excluded heir partially excludes others.

85. Those who are entirely excluded by reason of personal disqualification, do not exclude other heirs, either entirely or partially; but those who are excluded by reason of some intervening heir, do in some instances partially exclude others.

Example.

86. For instance, a man dies, leaving a father, a mother, and two sisters, who are infidels. Here the mother will get her third, notwithstanding the existence of the two infidel sisters, who are excluded by reason of their personal disqualification; but had they not been infidels, she would only have been

entitled to a sixth, although the sisters, who partially exclude her, are themselves entirely excluded by reason of the intervention of the father.

Rules where one of the heirs makes a partial surrender of his right.

87. If one of the heirs choose to surrender his portion of the inheritance for a consideration, still he must be included in the division. Thus in the case of there being a husband, a mother, and a paternal uncle, the shares are one-half and one-third. Here according to principle 64, the property must be made into six shares; of which the husband was entitled to three, the mother to two, and the paternal uncle, as a residuary, to the remaining one. Now supposing the estate left to amount to six lakhs of rupees, and the husband to content himself with two, still as far as affects the mother, the division must be made as if he had been a party and of the remaining four lakhs the mother must get two; otherwise, were he not made a party, the mother would get only one-third of four, instead of one-third of six lakhs as her legal share, and the remainder would go to the uncle as residuary.

SECTION VII.

OF THE INCREASE.

Definition of the increase.

88. The increase is where there are a certain number of legal sharers, each of whom is entitled to a specific portion, and it is found, on a distribution of the shares into which it is necessary to make the estate, that there is not a sufficient number to satisfy the just demands of all the claimants.

Cases in which it takes effect.

89. It takes effect in three cases; either when the estate should be made into six shares, or when it should be made into twelve, or when it should be made into twenty-four. See principles (67, 68, 69.) One example will suffice.

Example of.

90. A woman leaves a husband, a daughter, and both parents. Here the property should be made into twelve parts, of which, after the husband has taken his fourth or three, and the parents have taken their two-sixths or four, there remain only five shares for the daughter, instead of six, or the moiety to which by law she is entitled. In this case the number twelve, into which it was necessary to make the estate, must be increased to thirteen, with a view of enabling the daughter to realize six shares of the property.

SECTION VIII.

OF THE RETURN.

Definition of the return.

91. The return is where there being no residuaries, the surplus, after the distribution of the shares, returns to the sharers, and the doctrine of it is as follows.

Circumstances under which it takes effect.

First case example of.

92. It takes effect in four cases; first, where there is only one class of sharers unassociated with those not entitled to claim the return, as in the instance of two daugthers, or two sisters; in which case the surplus must be made into as many shares as there are sharers, and distributed among them equally.

Second case example of.

93. Secondly, where there are two or more classes of sharers, unassociated with those not entitled to

claim the return, as in the instance of a mother and two daughters; in which case the surplus must be made into as many shares as may correspond with the shares of inheritance to which the parties are entitled, and distributed accordingly. Thus the mother's share being one-sixth, and the two daughters' share two-thirds, the surplus must be made into six, of which the mother will take two and the daughters four.

Third case example of.

94. Thirdly, when there is only one class of sharers, associated with those not entitled to claim the return, as in the instance of three daughters and a husband; in which case the whole estate must be divided into the smallest number of shares of which it is susceptible, consistently, with giving the person excluded from the return his share of the inheritance, (which is in this case four,) and the husband will take one as his legal share or a fourth, the remaining three going to the daughters as their legal shares and as the return; but if it cannot be so distributed without a fraction, as in the case of a husband and six daughters, (three not being capable of division among six,) the proportion must be ascertained between the shares and sharers. Thus $3 \times 2 = 6$, which agreeing in three, the rule is, that the number 4, into which the estate was intended to be distributed, must be multipled by 2, that is, the measure or a third of the number of those entitled to the return. Thus $4 \times 2 = 8$, of which the husband will take two, and the daughters six or one each; and if on a comparison as above, the result should be prime, as in

the case of a husband and five daughters, the number 4, into which it was intended to distribute the estate, must be multiplied by 5, or the whole of the number of those entitled to a return. Thus $4 \times 5 = 20$, of which the husband will take five, and the daughters fifteen or three each.

Fourth case example of.

95. Fourthly, where there are two or more classes of sharers, associated with those not entitled to claim the return, as in the instance of a widow, four paternal grandmothers, and six sisters by the same mother only; in which case the whole estate must be divided into the smallest number of shares of which it is susceptible, consistently with giving the person excluded from the return her share of the inheritance, (which is in this case four.) Then, after the widow has taken her share, there remain three to be divided among the grandmothers and half sisters; but the share of the grandmothers is one-sixth, and of the half sisters one-third, and here, to give them their portions, the remainder should be made into six: but a third and a sixth of this number, amount to three, which agrees with the number to be divided among them; of which the half sisters will take two, and the grandmothers one. Had there been only one grandmother, and only two half sisters, there would have been no necessity for any further process, as the grandmother would have taken one-third, and the two half sisters the other two-thirds. But it is obvious, that two shares cannot be distributed among the six half sisters nor one among the four paternal grandmothers without a

fraction. To find the number into which the remainder should be made, recourse must be had to the seventh principle of distribution. The proportion between the shares and the sharers respectively must first be ascertained. Thus $2 \times 3 = 6$, which being composit or agreeing in two, and $1 \times 3 = 4-1$, which being prime, the whole of one set of sharers must be compared with the half of the other. Thus $3 = 4-1$, which also being prime, one of the numbers must be multiplied by the other. Thus $3 \times 4 = 12$; and having found this number it must be multiplied into that of the original division. Thus $4 \times 12 = 48$, of which the grandmothers will get 12 or three each, 12 being to 48 as 1 to 4, and the half sisters 24 or 4 each, 24 being to 48 as 2 to 4, and the widow will take the remaining twelve. It is different if the shares of the persons entitled to a return, do not agree with the number left for them, after deducting the share of the person not entitled to a return, as in the case of a widow, nine daughters, and six paternal grandmothers. Here the property must in the first instance be made into eight shares, being the smallest number of which it is susceptible, consistently with giving the widow her share. Then, after the widow has taken her share, there remain seven to be divided among the daughters and the grandmothers; but the share of the grandmothers is one-sixth, and of the daughters two-thirds; and here to give them their portions the property divisible among them should be made into six parts; but a sixth and two-thirds of this number amount to 5,

which disagrees with the number to be divided among them; in which case the rule is, that the number of shares of those entitled to a return, must be multiplied by the number into which it was necessary to make the property originally. Thus $8 \times 5 = 40$, of which the widow will take 5, the daughters will take 28, and the grandmothers 7. But it is obvious, that 28 cannot be distributed among the nine daughters, nor 7 among the six paternal grandmothers, without a fraction. To find the number into which the remainder should be distributed, recourse should be had to the sixth principle of distribution. The proportion between the shares and the sharers respectively must first be ascertained. Thus $9 \times 3 = 28-1$, and $6 = 7-1$, both of which being prime, the whole of one set of sharers must be compared with the whole of the other set. Thus $6 = 9-3$, which being concordant or agreeing in 3, the rule is, that the third of one of the numbers must be multiplied into the whole of the other. Thus $3 \times 6 = 18$; and having found this number, it must be multiplied into that of the preceding result. Thus $40 \times 18 = 720$, of which the daughters will get 504 or 56 each, 504 being to 720 as 28 to 40; the grandmothers will get 126 or 21 each, 126 being to 720 as 7 to 40; and the widow will get the remaining ninety.

SECTION IX.

OF VESTED INHERITANCES.

Definition of vested inheritances.

96. Where a person dies and leaves heirs, some of whom die prior to any distribution of the estate, the

survivors are said to have vested interests in the inheritance; in which case the rule is, that the property of the first deceased must be apportioned among his several heirs living at the time of his death, and it must be supposed that they received their respective shares accordingly. Rules in case of.

97. The same process must be observed with reference to the property of the second deceased, with this difference, that the proportion must be ascertained between the number of shares to which the second deceased was entitled at the first distribution, and the number into which it is requisite to distribute his estate to satisfy all the heirs. Ditto.

98. If the proportion should appear to be prime, the rule is, that the aggregate and individual shares of the preceding distribution must be multiplied by the whole number of the shares into which it is necessary to make the estate, at the subsequent distribution, and the individual shares at the subsequent distribution must be multiplied by the number of shares to which the deceased was entitled at the preceding one. Ditto.

99. If the proportion should be concordant, or composit, the rule is, that the aggregate and individual shares of the preceding distribution must be multiplied by the measure of the number of shares into which it is necessary to make the estate at the subsequent distribution, and the individual shares at the subsequent distribution must be multiplied by the measure of the number of shares to which the deceased was entitled at the preceding distribution. Ditto.

Example of.

100. For instance, a man dies leaving A, his wife, B and C, his two sons, and D and E, his two daughters; of whom A and D died before the distribution, the former leaving a mother, and the latter a husband.

At the first distribution the estate should be made into forty-eight shares, of which the widow will get six, the sons fourteen each, and the daughters seven each. On the death of the widow, leaving a mother and the above four children, her estate should, in the first instance, be made into thirty-six parts, of which the mother is entitled to six, the sons to ten each, and the daughters to five each; but being a case of vested inheritance, it becomes requisite to ascertain the proportion between the number of shares to which she was entitled at the preceding distribution, and the number into which it is necessary to make the estate. Thus $6 \times 6 = 36$, which proving concordant, or agreeing in six, the rule is, that the aggregate and individual shares of the preceding distribution be multiplied by six, or the measure of the number of shares into which it is necessary to make the estate at the second distribution. Thus $48 \times 6 = 288$, and $14 \times 6 = 84$, and $7 \times 6 = 42$; but the measure of the number to which the deceased was entitled at the preceding distribution being only one, it is needless to multiply by it the shares at the second distribution. On the death of one of the daughters, leaving her two brothers, her sister, and a husband, her estate should, in the first instance, be made into ten parts, of which her husband is entitled to five, her brothers to two each, and her sister to

one; but being a case of vested inheritance, it becomes requisite to ascertain the proportion between the number of shares to which she was entitled at the preceding distribution, and the number into which it is necessary to make her estate. But she derived forty-seven shares from the preceding distributions, (five at the second and forty-two at the first.) Thus $10 \times 4 = 47-7$, and $7 = 10-3$, and $3 = 7-4$, and $3 = 4-1$, which proving prime or agreeing in a unit only, the rule is, that the aggregate and individual shares of the preceding distributions be multiplied by ten, or the whole number of shares into which it is necessary to make the estate at the third distribution. Thus $288 \times 10 = 2880$, and $84 \times 10 = 840$, and $42 \times 10 = 420$, and $6 \times 10 = 60$, and $10 \times 10 = 100$, and $5 \times 10 = 50$. Then the shares at the third distribution should be multiplied by the number of shares to which the deceased sister was entitled at the preceding distributions. Thus $5 \times 47 = 235$, and $2 \times 47 = 94$, and $1 \times 47 = 47$. Therefore of the 2880 shares, the son B will get $840 + 100 + 94 = 1034$; the son C $840 + 100 + 94 = 1034$; the daughter E $420 + 50 + 47 = 517$; the mother of A, 60, and the husband of D. 235.

SECTION X.

OF MISSING PERSONS AND POSTHUMOUS CHILDREN.

101. The property of a missing person is kept in abeyance for ninety years. His estate in this interval

Of missing persons.

cannot derive any accession from the intermediate death of others, nor can any person who dies during this interval inherit from him.

Of a missing person being a coheir with others.

102. If a missing person be a coheir with others, the estate will be distributed as far as the others are concerned, provided they would take at all events, whether the missing person were living or dead. Thus in the case of a person dying, leaving two daughters, a missing son, and a son and daughter of such missing son. In this case the daughters will take half the estate immediately, as that must be their share at all events; but the grandchildren will not take any thing, as they are precluded on the supposition of their fathers being alive.

Of a child in the womb, there being sons.

103. Where a person dies leaving his wife pregnant, and he has sons, the share of one son must be reserved in case a posthumous son should be born.

Of a child in the womb, there being heirs who would succeed only on its default.

104. Where a person dies leaving his wife pregnant, and he has no sons, but there are other relatives who would succeed in the event only of his having no child, (as would be the case, for instance, with a brother or sister,) no immediate distribution of the property takes place.

Of the same, there being heirs who would take at all events.

105. But if those other relatives would succeed at all events to some portion, (larger without than with a child, as would be the case, for instance, with a mother) the property will be distributed, and the mother will obtain a sixth, the share to which she is necessarily entitled, and afterwards, if the child be not born alive, her portion will be augmented to one-third.

SECTION XI.

DE COMMORIENTIBUS.

Rule of succession where two or more individuals meet with a sudden death at the same time.

106. Where two or more persons meet with a sudden death about the same time, and it is not known which died first, it will be presumed according to one opinion, that the youngest survived longest; but according to the more accurate and prevailing doctrine, it will be presumed that the death of the whole party was simultaneous, and the property left will be distributed among the surviving heirs, as if the intermediate heirs who died at the same time with the original proprietor had never existed.*

SECTION XII.

OF THE DISTRIBUTION OF ASSETS.

Of claims and assets.

107. What has preceded relates to the ascertainment of the shares to which the several heirs are *en-*

* The following case may be cited as an example of this rule. A, B and C are grandfather, father and son. A and B perish at sea, without any particulars of their fate being known. In this case, if A have other sons, C will not inherit any of his property, because the law recognizes no right by representation, and sons exclude grandsons. Mr. Christian, in a note to Blackstone's Commentaries, (vol. 2, page 516) notices a curious question that was agitated some time ago, where it was contended that when a parent and child perish together, and the priority of their deaths is unknown, it was a rule of the civil law to presume that the child survives the parent. He proceeds however to say "But I should be inclined to think that our courts would require more than presumptive evidence to support a claim of this nature. Some curious cases *de commorientibus* may be seen in *causes celebres*, 3. *tom*, 412 et seq. in one of which where a father and son were slain

titled; but when the proper number of shares into which an estate should be made, may have been ascertained, it seldom happens that the assets of the estate exactly tally with such number; in other words, if it be found that the estate should be made into ten, or into fifty shares, it would seldom happen that the assets exactly amount in value to ten or fifty goldmohurs or rupees. To ascertain the proper shares of the different sets of heirs and creditors in such cases, the following rules are laid down:

Rules for apportioning them.

108. When the number of shares has been found into which the estate should be divided, and the number of shares to which each set of heirs is entitled, the former number must be compared with the number of the assets. If these numbers appear to be prime to each other, the rule is, that the share of each set of heirs must be multiplied into the number of the assets, and the result divided by the number of shares into which it was found necessary to make the estate. For instance, a man dies, leaving a widow, two daughters, and a paternal uncle, and property to the amount of 25 rupees. In this case, the estate should be originally divided into 24, of which the widow is entitled to 3, the daughters to 16, and the uncle to 5. Now to ascertain what shares of the estate left, these heirs are entitled to, the above rule must be observed. Thus $3 \times 25 = 75$, and

Where the numbers are prime

together in battle and on the same day the daughter became a professed nun, it was determined that her civil death was prior to the death of her father and brother, and that the brother, having arrived at the age of puberty, should be presumed to have survived his father."

31-32.

$16 \times 25 = 400$, and $5 \times 25 = 125$; but $75 \div 24 = 3\frac{3}{24}$, and $400 \div 24 = 16\frac{16}{24}$, and $125 \div 24 = 5\frac{5}{24}$.

109. If the numbers are composit, the rule is that the share of each set of heirs must be multiplied into the measure of the number of the assets and the result divided by the measure of the number of shares into which it was found necessary to make the estate. For instance, a man dies, leaving the same number of heirs as above and property to the amount of 50 rupees. Now as 24 and 50 agree in 2 the measure of both numbers is half. Thus $3 \times 25 = 75$, and $16 \times 25 = 400$, and $5 \times 25 = 125$, but $75 \div 12 = 6\frac{3}{12}$, and $400 \div 12 = 33\frac{4}{12}$, and $125 \div 12 = 10\frac{5}{12}$. Ditto where they are composit.

110. If it be desired to ascertain the number of shares of the assets to which each individual heir is entitled, the same process must be resorted to, with this difference, that the number of the assets must be compared with the share originally allotted to each individual heir, and the multiplication and division proceeded on as above. For instance, in the above case the original share of each daughter was 8, and $8 \times 25 = 200$, and $200 \div 12 = 16\frac{8}{12}$. And of individual heirs.

111. In a distribution of assets among creditors the rule is, that the aggregate sum of their debts must be the number into which it is necessary to make the estate, and the sum of each creditor's claim must be considered as his share. For instance, supposing the debt of one creditor to amount to 16 rupees, of another to 5, and of another to 3, and the debtor to have left property to the amount of 21 rupees. By observing the same process as that laid down in And of creditors.

principle (109,) it will be found that the creditor to whom the debt of 16 rupees was due, is entitled to 14 rupees, the creditor of 5 rupees to 4 rupees 6 annas and the creditor of 3 rupees to 2 rupees 10 annas.

SECTION XIII.

OF PARTITION.

Property where conveniently partible should be distributed among the heirs at the desire of one or more.

112. Where two persons claim partition of an estate which has devolved on them by inheritance, it should be granted ; and so also where one heir claims it, provided the property admit of separation without detriment to its utility.

In other cases the distribution should not take place without the consent of all.

113. But where the property cannot be separated without detriment to its several parts, the consent of all the coheirs is requisite ; so also where the estate consists of articles of different species.

Mode of distribution.

114. On the occasion of a partition, the property (where it does not consist of money) should be distributed into several distinct shares, corresponding with the portions of the coheirs ; each share should be appraised, and then recourse should be had to drawing of lots.

Of partition by usufruct.

115. Another common method of partition is by usufruct, where each heir enjoys the use or the profits of the property by rotation ; but this method is subordinate to actual partition ; and where one coheir demands separation, and the other a division of the usufruct only, the former claim is entitled to preference in all practicable cases.

CHAPTER II.

OF INHERITANCE ACCORDING TO THE IMAMEEYA, OR SCHIA DOCTRINE.

1. According to the tenets of this Sect, the right of inheritance proceeds from three different sources.

Three sources of the right of inheritance.

2. First, it accrues by virtue of consanguinity. Secondly, by virtue of marriage. Thirdly, by virtue of *Willa.**

Enumeration of them.

3. There are three degrees of heirs who succeed by virtue of consanguinity; and so long as there is any one of the first degree, even though a female, none of the second degree can inherit; and so long as there is any one of the second degree, none of the third can inherit.

Heirs by consanguinity consist of three degrees.

4. The first degree comprises the parents, and the children, and grandchildren, how low in descent soever, the nearer of whom exclude the more distant. Both parents, or one of them inherit together with a child, a grandchild, or a great-grandchild; but a grandchild does not inherit together with a child, nor a great-grandchild together with a grandchild.

Enumeration of heirs of the first degree.

Their relative rights.

5. This degree is divided into two classes; the roots which are limited, and the branches which are

Sub-division of.

* In a note to his translation of the *Hedaya*, Mr. Hamilton observes, that "there is no single word in our language fully expressive of this term. The shortest definition of it is, 'the relation between the master (or patron) and his freedman,' but even this does not express the whole meaning." Had he proceeded to state "and the relation between two persons who had made a reciprocal testamentary contract," the definition might have been more complete.

unlimited. The former are the parents who are not represented by their parents; the latter are the children who are represented by their children. An individual of one class does not exclude an individual of the other, though his relation to the deceased be more proximate; but the individuals of either class exclude each other in proportion to their proximity.

Of coheirs with children.

6. No claimant has a title to inherit with children, but the parents, or the husband and wife.

Of the sons' and daughters' offspring.

7. The children of sons take the portions of sons, and the children of daughters take the portions of daughters, however low in descent.

Of the second degree.

8. The second degree comprises the grandfather, and grandmother, and other ancestors, and brothers, and sisters, and their descendants, however low in descent, the nearer of whom exclude the more distant. The great-grandfather cannot inherit together with a grandfather or a grandmother; and the son of a brother cannot inherit with a brother or a sister; and the grandson of a brother cannot inherit with the son of a brother, or with the son of a sister.

Their relative rights.

Sub-division of.

9. This degree again is divided into two classes; the grand parents and other ancestors, and the brethren and their descendants. Both these classes are unlimited, and their representatives in the ascending and descending line, may be extended *ad infinitum*. An individual of the one class does not exclude an individual of the other, though his relation to the deceased be more proximate; but the individuals of either class exclude each other, in proportion to their proximity.

Of the third degree.

10. The third degree comprises the paternal and maternal uncles and aunts and their descendants, the nearer of whom exclude the more distant. The son of a paternal uncle cannot inherit with a paternal uncle, or a paternal aunt, nor the son of a maternal uncle with a maternal uncle, or a maternal aunt.

Their relative rights.

Additional rules.

11. This degree is unlimited in the ascending and descending line, and their representatives may be extended *ad infinitum;* but so long as there is a single aunt or uncle of the whole blood, the descendants of such persons cannot inherit. Uncles and aunts all share together; except some be of the half and others of the whole blood. A paternal uncle by the same father only, is excluded by a paternal uncle by the same father and mother; and the son of a paternal uncle by the whole blood excludes a paternal uncle of the half blood.

Enumeration of other heirs, of the third degree.

12. In default of all the heirs above enumerated, the paternal and maternal uncles and aunts of the father and mother succeed; and in their default their descendants, to the remotest generation, according to their degree of proximity to the deceased. In default of all those heirs, the paternal and maternal uncles and aunts of the grand parents and great grand parents inherit, according to their degree of proximity to the deceased.*

* There seems to be some similarity between the order of succession here laid down, and that prescribed in the English Law for taking out letters of administration: "In the first place the children, or on failure of the children, the parents of the deceased, are entitled to the administration; both which indeed are in the first degree; but with us the children are allowed the preference. Then follow brothers, grandfa-

General rule relative to the half and whole blood.

13. It is a general rule that the individuals of the whole blood exclude those of the half blood, who are of the same rank ; but this rule does not apply to individuals of different ranks. For instance, a brother or sister of the whole blood excludes a brother or sister of the half blood : a son of the brother of the whole blood, however, does not exclude a brother of the half blood, because they belong to different ranks : but he would exclude the son of a half brother who is of the same rank ; so also an uncle of the whole blood does not exclude a brother of the half blood, though he does an uncle of the half blood.

Exception.

Example.

Additional rules.

14. The principle of the whole blood excluding the half blood, is confined also to the same rank, among collaterals : for instance, generally a nephew or niece whose father was of the whole blood, does not exclude his or her uncle or aunt of the half blood ; except in the case of there being a son of a paternal uncle of the whole blood, and a paternal uncle of the half blood by the same father only, the latter of whom is excluded by the former.

Exception.

Additional rule where the sides of relation differ.

15. This principle of exclusion does not extend to uncles and aunts being of different sides of relation to the deceased ; for instance, a paternal uncle or aunt of the whole blood, does not exclude a maternal uncle or aunt of the half blood ; but a paternal uncle or aunt of the whole blood, excludes a paternal uncle or aunt of the half blood ; and so likewise a ma-

And where they are the same.

thers, uncles or nephews, (and the females of each class respectively,) and lastly, cousins. The half blood is admitted to the administration as well as the whole, for they are of the kindred of the intestate."—Blackstone's Commentaries, vol. 2, page 504.

ternal uncle or aunt of the whole blood, excludes a maternal uncle or aunt of the half blood.

Additional rule where the sides differ.

16. If a man leave a paternal uncle of the half blood, and a maternal aunt of the whole blood, the former will take two-thirds, in virtue of his claiming through the father, and the latter one-third, in virtue of her claiming through the mother; as the property would have been divided between the parents in that proportion, had they been the claimants instead of the uncle and aunt.

Further exception relative to the exclusion of the half blood.

17. The general rule, that those related by the same father and mother, exclude those who are related by the same mother only, does not operate in the case of individuals to whom a legal share has been assigned.

Of uterine and half sisters.

18. If a man leave a whole sister, and a sister by the same mother only, the former will take half the estate and the latter one-sixth, the remainder reverting to the whole sister; and if there be more than one sister by the same mother only, they will take one-third, and the remaining two-thirds will go to the whole sister.

Rule in case of a double relation.

19. Where there are two heirs, one of whom stands in a double relation: for instance, if a man die leaving a maternal uncle, and a paternal uncle who is also his maternal uncle,* the former will take one-

* The relation of paternal and maternal uncle may exist in the same person in the following manner: A having a son C by another wife, marries B having a son D by another husband. Then C and D intermarry and have issue, a son E, and A and B have a son F. Thus F is both the paternal and maternal uncle of E. So likewise if a person have a half brother by the same father, and a half sister by the same

third, and the latter two-thirds, and he will be further entitled to take one-half of the third which devolved on the maternal uncle ; and thus he will succeed altogether to five-sixths, leaving the other but one-sixth.

Of claimants by marriage.

20. Secondly, those who succeed in virtue of marriage are the husband and wife, who can never be excluded in any possible case ; and their shares are half for the husband, and a fourth for the wife, where there are no children, and a fourth for the husband, and an eighth for the wife, where there are children.

Of the succession of husband and wife.

21. Where a wife dies, leaving no other heir, her whole property devolves on her husband; and where a husband dies, leaving no other heir but his wife, she is only entitled to one-fourth of his property, and the remaining three-fourths will escheat to the public treasury.

Rule in case of marriage not consummated.

22. If a sick man marry and die of that sickness, without having consummated the marriage, his wife shall not inherit his estate; nor shall he inherit if his wife die before him, under such circumstances. But if a sick woman marry, and her husband die before her, she shall inherit of him, though the marriage was never consummated, and though she never recovered from that sickness.

Rule in case of divorce on deathbed.

23. If a man on his deathbed divorce his wife, she shall inherit, provided he died of that sickness within one year from the period of divorce; but not if he lived for upwards of a year.

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mother, who intermarry, he will necessarily be the paternal and maternal uncle of their issue.

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24. In case of a reversible divorce, if the husband die within the period of the wife's probation, or if she die within that period, they have a mutual right to inherit each other's property. And of reversible divorce.

25. The wife by an usufructuary, or temporary marriage, has no title to inherit.* And of irregular marriage.

26. Thirdly, those who succeed in virtue of *Willa*; but they never can inherit so long as there is any claimant by consanguinity or marriage. Of claimants by *willa*.

27. *Willa* is of two descriptions; that which is derived from manumission, where the emancipator by such act derives a right of inheritance; and that which depends on mutual compact, where two persons reciprocally engage, each to be heir of the other. Two descriptions of.

28. Claimants under the latter title are excluded by claimants under the former. The first preferred.

29. The general rules of exclusion, according to this sect, are similar to those contained in the orthodox doctrine; except that they make no distinction between male and female relations. Thus a daughter excludes a son's son, and a maternal uncle excludes a paternal grand uncle; whereas, according to the orthodox doctrine in such cases, the daughter would only get half, and the maternal uncle would be wholly excluded by the paternal uncle of the father. General rules of exclusion.

30. Difference of allegiance is no bar to inheritance, and homicide, whether justifiable or accidental, does not operate to exclude from the inheritance. Difference of allegiance does not exclude, nor homicide, unless wilful.

* This species of contract is reprobated by the orthodox sect, and they are both considered wholly illegal. See Hamilton's *Hedaya*, vol. i., pages 71 and 72.

The homicide, to disqualify, must have been of *malice prepense.*

The doctrine of the increase not admitted.

31. The legal number of shares into which it is necessary to make the property, cannot be increased if found insufficient to satisfy all the heirs without a fraction. In such case, a proportionate deduction will be made from the portion of such heir as may, under certain circumstances, be deprived of a legal share, or from any heir whose share admits of diminution. For instance, in the case of a husband, a daughter and parents. Here the property must be divided into twelve, of which the husband is entitled to three or a fourth; the parents to two-sixths or four, and the daughter to half; but there only remain five shares for her instead of six, or the moiety to which she is entitled. In this case, according to the orthodox doctrine, the property would have been made into thirteen parts to give the daughter her six shares; but, according to the *Imameeya* tenets, the daughter must be content with the five shares that remain, because in certain cases her right as a legal sharer, is liable to extinction; for instance, had there been a son, the daughter would not have been entitled to any specific share, and she would become a residuary; whereas the husband or parents can never be deprived of a legal share, under any circumstances.

Example.

Of the return.

32. Where the assets exceed the number of heirs, the surplus reverts to the heirs. The husband is entitled to share in the return; but not the wife. The mother also is not entitled to share in the return, if there are brethren; and where there is any indivi-

dual possessing a double relation, the surplus reverts exclusively to such individual.

33. On a distribution of the estate, the elder son, if he be worthy, is entitled to his father's sword, his Koran, his wearing apparel, and his ring.* Privilege of primogeniture.

CHAPTER III.

OF SALE.

1. Sale is defined to be a mutual and voluntary exchange of property for property. Definition of sale.

2. A contract of sale may be effected by the express agreement of the parties, or by reciprocal delivery. How effected.

3. Sale is of four kinds; consisting of commutation of goods for goods: of money for money: of money for goods: and of goods for money; which last is the most ordinary species of this kind of contract. Four kinds of.

4. Sales are either absolute, or conditional, or imperfect, or void. Four denominations of.

* In the foregoing summary I am not aware that I have omitted any point of material importance. The legal shares allotted to the several heirs are of course the same as those prescribed in the Soonee Code, both having the precepts of the Koran as their guide. The rules of distribution and of ascertaining the relative shares of the different claimants are also (*mutatis mutandis*) the same. It is not worth while to notice in this compilation the doctrines of the *Imameeya* sect on the law of contracts or their tenets in miscellaneous matters. A Digest of their laws, relative to those subjects, was some time ago prepared and a considerable part of it translated by an eminent Orientalist (Colonel John Baillie,) by whom however it was left unfinished; probably from an opinion that the utility of the undertaking might not be commensurate to the time and labour employed upon it.

Of an absolute sale.

5. An absolute sale is that which takes effect immediately; there being no legal impediment.

Of a conditional sale.

6. A conditional sale is that which is suspended on the consent of the proprietor, or (where he is a minor) on the consent of his guardian, in which there is no legal impediment, and no condition requisite to its completion but such consent.

Of an imperfect sale.

7. An imperfect sale is that which takes effect on seizin; the legal defect being cured by such seizin.

Of a void sale.

8. A void sale is that which can never take effect; in which the articles opposed to each other, or one of them, not bearing any legal value, the contract is nude.

Of the consideration.

9. The consideration may consist of whatever articles, bearing a legal value, the seller and purchaser may agree upon; and property may be sold for prime cost, or for more, or for less than prime cost.

Of the parties.

10. It is requisite that there should be two parties to every contract of sale, except where the seller and purchaser employ the same agent, or where a father or a guardian makes a sale on behalf of a minor, or where a slave purchases his own freedom by permission of his master.

Who may contract.

11. It is sufficient that the parties have a sense of the obligation they contract; and a minor, with the consent of his guardian, or a lunatic in his lucid intervals, may be contracting parties.

Postponing payment illegal.

Exception.

12. In a commutation of goods for goods, or of money for money, it is illegal to stipulate for a future period of delivery; but in a commutation of money

for goods or of goods for money, such stipulation is authorised.

13. It is essential to the validity of every contract of sale, that the subject of it and the consideration should be so determinate as to admit of no future contention regarding the meaning of the contracting parties. Certainty requisite.

14. It is also essential that the subject of the contract should be in actual existence at the period of making the contract, or that it should be susceptible of delivery, either immediately or at some future definite period. Other requisite conditions.

15. In a commutation of money for money, or of goods for goods, if the articles opposed to each other are of the nature of similars, equality in point of quantity is an essential condition. Equality when requisite.

16. It is unlawful to stipulate for any extraneous condition, involving an advantage to either party, or any uncertainty which might lead to future litigation; but if the extraneous condition be actually performed, or the uncertainty removed, the contract will stand good. Illegal conditions. Exception.

17. It is lawful to stipulate for an option of dissolving the contract; but the term stipulated should not exceed three days. Of option.

18. When payment is deferred to a future period, it must be determinate and cannot be suspended on an event, the time of the occurrence of which is uncertain, though its occurrence be inevitable. For instance, it is not lawful to suspend payment until the wind shall blow, or until it shall rain, nor is it Payment how deferrible.

lawful, even though the uncertainty be so inconsiderable as almost to amount to a fixed term ; for instance, it is not lawful to suspend payment until the sowing or reaping time.

Sale of a debt.

19. It is not lawful to sell property in exchange for a debt due from a third person, though it is for a debt due from the seller.

Resale of personal property.

20. A resale of personal property cannot be made by the purchaser, until the property shall actually have come into his possession.

Warranty implied.

21. A warranty as to freedom from defect and blemish, is implied in every contract of sale.

Where the property differs from the description.

22. Where the property sold differs, either with respect to quantity or quiality, from what the seller had described it, the purchaser is at liberty to recede from the contract.

Sale of land.

23. By the sale of land nothing thereon, which is of a transitory nature, passes. Thus the fruit on a tree belongs to the seller, though the tree itself, being a fixture, appertains to the purchaser of the land.

Responsibility in case of option.

24. Where an option of dissolving the contract has been stipulated by the purchaser, and the property sold is injured or destroyed in his possession, he is responsible for the *price*, agreed upon ; but where the stipulation was on the part of the seller, the purchaser is responsible for the *value* only of the property.

Option how annulled.

25. But the condition of option is annulled by the purchaser's exercising any act of ownership, such as to take the property out of *statu quo*.

Option to purchasers of unseen property.

26. Where the property has not been seen by the purchaser, nor a sample, (where a sample suffices,)

he is at liberty to recede from the contract, provided he may not have exercised any act of ownership; if upon seeing the property it does not suit his expectation, even though no option may have been stipulated.

Exception.

27. But though the property have not been seen by the seller, he is not at liberty to recede from the contract (except in a sale of goods for goods) where no option was stipulated.

No option to sellers.

Exception.

28. A purchaser who may not have agreed to take the property with all its faults, is at liberty to return it to the seller on the discovery of a defect, of which he was not aware at the time of the purchase, unless, while in the hands of the purchaser, it received a further blemish; in which case he is only entitled to compensation.

Option on discovering a defect.

Exception.

29. But if the purchaser have sold such faulty article to a third person, he cannot exact compensation from the original seller; unless, by having made an addition to the article prior to the sale, he was precluded from returning it to the original seller.

Rule in case of resale.

Exception.

30. In a case where articles are sold, and are found on examination to be faulty, complete restitution of the price may be demanded from the seller, even though they have been destroyed in the act of trial, if the purshaser had not derived any benefit from them; but if the purchaser had made beneficial use of the faulty articles, he is only entitled to proportional compensation.

Cases in which restitution may be demanded.

And compensation only.

31. If a person sell an article which he had purchased, and be compelled to receive back such article and to refund the purchase money, he is entitled to

The first purchaser is on a footing with the second.

Proviso: the same remedy against the original seller, if the defect be of an inherent nature.

Remedy against the seller how lost.

32. If a purchaser, after becoming aware of a defect in the article purchased, make use of the article or attempt to remove the defect, he shall have no remedy against the seller, (unless there may have been some special clause in the contract) ; such act on his part implying acquiescence.

General rules for the right of restitution.

33. It is a general rule, that if the articles sold are of such a nature as not easily to admit of separation or division without injury, and part of them, subsequently to the purchase, be discovered to be defective, or to be the property of a third person, it is not competent to the purchaser to keep a part and to return a part, demanding a proportional restitution of the price for the part returned. In this case he must either keep the whole, demanding compensation for the proportion that is defective, or he must return the whole, demanding complete restitution of the price. It is otherwise where the several parts may be separated without injury.

And that of compensation

Illegal practices.

34. The practices of forestalling, regrating, and engrossing, and of selling on Friday, after the hour of prayer, are all prohibited, though they are valid.

CHAPTER IV.

OF SHOOFAA, OR PRE-EMPTION.

Definition of pre-emption.

1. *Shoofaa*, or the right of pre-emption, is defined to be a power of possessing property which has been sold, by paying a sum equal to that paid by the purchaser.

With respect to what property it does and to what it does not take effect.

2. The right of pre-emption takes effect with regard to property sold, or parted with by some means equivalent to sale, but not with regard to property the possession of which has been transferred by gift, or by will, or by inheritance; unless the gift was made for a consideration, and the consideration was expressly stipulated; but pre-emption cannot be claimed where the donor has received a consideration for his gift, such consideration not having been expressly stipulated.

Additional rules.

3. The right of pre-emption takes effect with regard to property, whether divisible or indivisible; but it does not apply to moveable property, and it cannot take effect until after the sale is complete, as far as the interest of the seller is concerned.

Not restricted to any particular class.

4. The right of pre-emption may be claimed by all descriptions of persons. There is no distinction made on account of difference of religion.

Rights and privileges of.

5. All rights and privileges which belong to an ordinary purchaser, belong equally to a purchaser under the right of pre-emption.

Who may claim pre-emption.

6. The following persons may claim the right of pre-emption in the order enumerated: a partner in the property sold, a participator in its appendages, and a neighbour.

Necessary forms to be observed.

7. It is necessary that the person claiming this right, should declare his intention of becoming the purchaser, immediately on hearing of the sale, and that he should, with the least practicable delay, make affirmation, by witness, of such his intention, either in the presence of the seller, or of the purchaser, or on the premises.

Claim when preferable.

8. The above preliminary conditions being fulfilled, the claimant of pre-emption is at liberty at any subsequent period to prefer his claim to a court of justice.*

Rights of the first purchaser.

9. The first purchaser has a right to retain the property until he has received the purchase money from the claimant by pre-emption, and so also the seller in a case where delivery may not have been made.

Rules where the property has undergone alteration while in the possession of the first purchaser.

10. Where an intermediate purchaser has made any improvements to the property, the claimant by pre-emption must either pay for their value, or cause them to be removed; and where the property may have been deteriorated by the act of the intermediate purchaser, he (the claimant) may insist on a proportional abatement of the price; but where the de-

* Much difference of opinion prevails as to this point. It seems equitable that there should be some limitation of time to bar a claim of this nature; otherwise a purchaser may be kept in a continual state of suspense. *Ziffer* and *Mahomed* are of opinion, (and such also is the doctrine according to one tradition of *Aboo Yoosuf*,) that if the claimant causelessly neglect to advance his claim for a period exceeding one month, such delay shall amount to a defeasance of his right; but according to *Aboo Huneefa*, and another tradition of *Aboo Yoosuf*, there is no limitation as to time. This doctrine is maintained in the *Futawai Aulumgeeree*, in the *Moheetoo Surukhsee*, and in the *Hedaya*; and it seems to be the most authentic, and generally prevalent opinion. But the compiler of the *Futawai Aulumgeeree* admits that decisions are given both ways.

terioration has taken place without the instrumentality of the intermediate purchaser, the claimant by pre-emption must either pay the whole price, or resign his claim altogether.

Rules where the property has been improved by the claimant by pre-emption, and it appear to belong to a third person.

11. But a claimant by pre-emption having obtained possession of, and made improvements to property, is not entitled to compensation for such improvements, if it should afterwards appear that the property belonged to a third person. He will, in this case, recover the price from the seller or from the intermediate purchaser, (if possession had been given,) and he is at liberty to remove his improvements.

Where there is a dispute as to the price paid.

12. Where there is a dispute between the claimant by pre-emption and the purchaser, as to the price paid, and neither party have evidence, the assertion, on oath, of the purchaser must be credited; but where both parties have evidence, that of the claimant by pre-emption should be received in preference.

Legal devices by which a claim of pre-emption may be evaded.

13. There are many legal devices by which the right of pre-emption may be defeated. For instance, where a man fears that his neighbour may advance such a claim, he can sell all his property, with the exception of that part immediately bordering on his neighbour's, and where he is apprehensive of the claim being advanced by a partner, he may, in the first instance, agree with the purchaser for some exorbitant nominal price, and afterwards commute that price for something of an inferior value; when if a claimant by pre-emption appear, he must pay the price first stipulated, without reference to the subsequent commutation.

CHAPTER V.

OF GIFTS.

Definition of gift.

1. A gift is defined to be the conferring of property without a consideration.

Essential conditions of.

2. Acceptance and seizin, on the part of the donee, are as necessary as relinquishment on the part of the donor.

Cannot be made to take effect *in futuro*.

3. A gift cannot be made to depend on a contingency, nor can it be referred to take effect at any future definite period.

Delivery and seizin requisite.

4. It is requisite that a gift should be accompanied by delivery of possession, and that seizin should take effect immediately, or, if at a subsequent period, by desire of the donor.

The thing given must be actually existing at the time.

5. A gift cannot be made of any thing to be produced *in futuro;* although the means of its production may be in the possession of the donee. The subject of the gift must be actually in existence at the time of the donation.

An undefined gift of divisible property not valid.

6. The gift of property which is undivided, and mixed with other property, admitting at the same time of division or separation, is null and void, unless it be defined previously to delivery ; for delivery of the gift cannot in that case be made without including something which forms no part of the gift..

Rules in case of two or more donees.

7. In the case of a gift made to two or more donees, the interest of each donee must be defined, either at the time of making the gift, or on delivery.

A gift must be express, and must be entire-

8. A gift cannot be implied. It must be express and unequivocal, and the intention of the donor must

be demonstrated by his entire relinquishment of the thing given, and the gift is null and void where he continues to exercise any act of ownership over it. ly relinquished by the donor.

9. The cases of a house given to a husband by a wife, and of property given by a father to his minor child, form exceptions to the above rule. Exceptions.

10. Formal delivery and seizin are not necessary in the case of a gift to a trustee, having the custody of the article given, nor in the case of a gift to a minor. The seizin of the guardian in the latter case is sufficient. Of seizin by proxy.

11. A gift on a death-bed is viewed in the light of a legacy, and cannot take effect for more than a third of the property; consequently no person can make a gift of any part of his property on his death-bed to one of his heirs, it not being lawful for one heir to take a legacy without the consent of the rest. Of gift on a death-bed.

12. A donor is at liberty to resume his gift, except in the following instances: Resumption admissible.

13. A gift cannot be resumed where the donee is a relation, nor where any thing has been received in return, nor where it has received any accession, nor where it has come into the possession of a second donee, or into that of the heirs of the first. Except in certain cases.

14. Besides the ordinary species of gift, the law enumerates two contracts under the head of gifts, which however more nearly resemble exchange or sale. They are technically termed *Hiba bil Iwuz*, mutual gift, or gift for a consideration, and *Hiba ba shurt ool Iwuz*, gift on stipulation, or on promise of a consideration. Two peculiar kinds of gift.

Of *Hiba bil Iwuz.*

15. *Hiba bil Iwuz* is said to resemble a sale in all its properties; the same conditions attach to it, and the mutual seizin of the donees is not, in all cases, necessary.

Of *Hiba ba shurt ool Iwuz.*

16. *Hiba ba shurt ool Iwuz*, on the other hand, is said to resemble a sale in the first stage only; that is, before the consideration for which the gift is made has been received, and the seizin of the donor and donee is therefore a requisite condition.

CHAPTER VI.

OF WILLS.

1. There is no preference shown to a written over a nuncupative will, and they are entitled to equal weight, whether the property which is the subject of the will be real or personal. Nuncupative and real wills equally valid.

2. Legacies cannot be made to a larger amount than one-third of the testator's estate, without the consent of the heirs. Of legacies.

3. A legacy cannot be left to one of the heirs without the consent of the rest. To an heir.

4. There is this difference between the property which is the subject of inheritance and that which is the subject of legacy. The former becomes the property of the heir by the mere operation of law; the latter does not become the property of the legatee until his consent shall have been obtained either expressly or impliedly. Distinction between property acquired by inheritance and by will.

5. The payment of legacies to a legal amount precedes the satisfaction of claims of inheritance. Legacies precede claims of inheritance.

6. All the debts due by the testator must be liquidated before the legacies can be claimed. And debts precede legacies.

7. An acknowledgment of debt in favour of an heir on a death-bed resembles a legacy; inasmuch as it does not avail for more than a third of the estate. Acknowledgment of a debt to an heir.

8. It is not necessary that the subject of the legacy should exist at the time of the execution of the will. It is sufficient for its validity that it should be in existence at the time of the death of the testator. Of the subject of a legacy.

Of illegal provisions.

9. The general validity of a will is not affected by its containing illegal provisions, but it will be carried into execution as far as it may be consistent with law.

Special rule relative to legatees.

10. A person not being an heir at the time of the execution of the will, but becoming one previously to the testator's death, cannot take the legacy left to him by such will; but a person being an heir at the time of the execution, and becoming excluded previously to the testator's death, can take the legacy left to him by such will.

A legacy may be retracted by implication.

11. If a man bequeath property to one person, and subsequently make a bequest of the same property to another individual, the first bequest is annulled; so also if he sell or give the legacy to any other individual; even though it may have reverted to his possession before his death, as these acts amount to a retractation of the legacy.

Rule in case of excessive legacies.

12. Where a testator bequeaths more than he legally can to several legatees, and the heirs refuse to confirm his disposition, a proportionate abatement must be made in all the legacies.

And of different legacies to the same person.

13. Where a legacy is left to an individual, and subsequently a larger legacy to the same individual, the larger legacy will take effect; but where the larger legacy was prior to the smaller one, the latter only will take effect.

And of the same legacy to two individuals.

14. A legacy being left to two persons indiscriminately, if one of them die before the legacy is payable, the whole will go to the survivor; but if half was left to each of them, the survivor will get only half, and the remaining moiety will devolve on the

heirs; so also in the case of an heir and a stranger being left joint legatees.

Of Executors.

15. Where there is no executor appointed, the father or the grandfather may act as executor, or in their default their executors.

Should be *Mahomedans.*

16. A Mahomedan should not appoint a person of a different persuasion to be his executor, and such appointment is liable to be annulled by the ruling power.

Cannot resign.

17. Executors having once accepted cannot subsequently decline the trust.

Rule where there are two.

18. Where there are two executors, it is not competent to one of them to act singly, except in cases of necessity, and where benefit to the estate must certainly accrue.

CHAPTER VII.

OF MARRIAGE, DOWER, DIVORCE, AND PARENTAGE.

Definition of marriage.

1. Marriage is defined to be a contract founded on the intention of legalizing generation.

Essentials of.

2. Proposal and consent are essential to a contract of marriage.

Conditions of.

3. The conditions are discretion, puberty, and freedom of the contracting parties. In the absence of the first condition, the contract is void *ab initio;* for a marriage cannot be contracted by an infant without discretion, nor by a lunatic. In the absence of the two latter conditions, the contract is voidable; for the validity of marriages contracted by discreet minors, or slaves, is suspensive on the consent of their guardians or masters. It is also a condition, that there should be no legal incapacity on the part of the woman; that each party should know the agreement of the other; that there should be witnesses to the contract; and that the proposal and acceptance should be made at the same time and place.

Competency of witnesses to.

4. There are only four requisites to the competency of witnesses to a marriage contract; namely, freedom, discretion, puberty and profession of the Moosulmaun faith.

Special rules regarding them.

5. Objections as to character and relation, do not apply to witnesses in a contract of marriage, as they do in other contracts.

6. A proposal may be made by means of agency, or by letter; provided there are witnesses to the receipt of the message or letter, and to the consent on the part of the person to whom it was addressed.

Proposal may be made by agency, or by letter.

7. The effect of a contract of marriage is to legalize the mutual enjoyment of the parties; to place the wife under the dominion of the husband; to confer on her the right of dower, maintenance,* and habitation; to create, between the parties, prohibited degrees of relation and reciprocal rights of inheritance; to enforce equality of behaviour towards all his wives on the part of the husband, and obedience on the part of the wife, and to invest the husband with a power of correction in cases of disobedience.

Effect of the contract.

8. A free-man may have four wives, but a slave can have two only.

Number of wives.

9. A man may not marry his mother, nor his grandmother, nor his mother-in-law, nor his step-mother, nor his step-grandmother, nor his daughter, nor his granddaughter, nor his daughter-in-law, nor his granddaughter-in-law, nor his step-daughter, nor his sister, nor his foster-sister, nor his niece, nor his aunt, nor his nurse.

Enumeration of prohibited relations.

10. Nor is it lawful for a man to be married at the same time to any two women who stand in such a degree of relation to each other, as, that, if one of

Additional prohibitions.

* The right of a wife to maintenance is expressly recognized; so much so, that if the husband be absent and have not made any provision for his wife, the law will cause it to be made out of his property; and in case of divorce, the wife is entitled to maintenance during the period of her probation.

them had been a male, they could not have intermarried.

Of free-men and slaves.

11. Marriage cannot be contracted with a person who is the slave of the party, but the union of a free-man with a slave, not being his property, with the consent of the master of such slave, is admissible; provided he be not already married to a free-woman.

Of the religion of the parties.

12. Christians, Jews, and persons of other religions, believing in one God, may be espoused by *Mahomedans.*

Presumption of marriage.

13. Marriage will be presumed, in a case of proved continual cohabitation, without the testimony of witnesses; but the presence of witnesses is nevertheless requisite at all nuptials.

Capacity to contract.

14. A woman, having attained the age of puberty, may contract herself in marriage with whomsoever she pleases; and her guardian has no right to interfere if the match be equal.

Right of guardians.

15. If the match be unequal, the guardians have a right to interfere with a view to set it aside.

Where an infant contracts.

16. A female, not having attained the age of puberty, cannot lawfully contract herself in marriage without the consent of her guardians, and the validity of the contract entirely depends upon such consent.

Limitation.

17. But in both the preceding cases the guardian should interfere before the birth of issue.

Contract when dissoluble by the parties.

18. A contract of marriage entered into by a father or grandfather, on behalf of an infant, is valid and binding, and the infant has not the option of annulling it on attaining maturity; but if entered into by any

other guardian, the infant so contracted may dissolve the marriage on coming of age, provided that such delay does not take place as may be construed into acquiescence.

Of guardians for marriage.

19. Where there is no paternal guardian, the maternal kindred may dispose of an infant in marriage; and in default of maternal guardians the government may supply their place.

Of dower.

20. A necessary concomitant of a contract of marriage is dower, the maximum of which is not fixed, but the minimum is ten *dirms*,* and it becomes due on the consummation of the marriage (though it is usual to stipulate for delay as to the payment of a part) or on the death of either party, or on divorce.

Minimum of.

When due.

Where no amount fixed.

21. Where no amount of dower has been specified, the woman is entitled to receive a sum equal to the average rate of dower granted to the females of her father's family.

Whether prompt or deferred.

22. Where it may not have been expressed whether the payment of the dower is to be prompt or deferred, it must be held that the whole is due on demand.

Disqualification of fosterage and consanguinity.

23. It is a rule that whatsoever is prohibited by reason of consanguinity is prohibited by reason of fosterage; but as far as marriage is concerned, there are one or two exceptions to this rule; for instance a man may marry his sister's foster-mother, or his foster-sister's mother, or his foster-son's sister, or his foster-brother's sister.

Exceptions.

* The value of the *dirm* is very uncertain. Ten *dirms* according to one account make about six shillings and eight pence sterling. See Note to Hamilton's translation of the *Hidaya*, page 122, volume I.

Of the rules of divorce.

24. A husband may divorce his wife without any misbehaviour on her part, or without assigning any cause; but before the divorce becomes irreversible, according to the more approved doctrine, it must be repeated three times, and between each time the period of one month must have intervened; and in the interval he may take her back either in an express or implied manner.

Conditions precedent to re-union.

25. A husband cannot again cohabit with his wife who has been three times irreversibly divorced, until after she shall have been married to some other individual and separated from him either by death or divorce; but this is not necessary to a re-union, if she have been separated by only one or two divorces.

Of a death-bed divorce.

26. If a husband divorce his wife on his death-bed, she is nevertheless entitled to inherit, if he died before the expiration of the term (four months and ten days) of probation, which she is bound to undergo before contracting a second marriage.

What amounts to a divorce.

27. A vow of abstinence made by a husband, and maintained inviolate for a period of four months, amounts to an irreversible divorce.*

Of divorce purchased.

28. A wife is at liberty, with her husband's consent, to purchase from him her freedom from the bonds of marriage.

Another mode of divorce.

29. Another mode of separation is by the husband's making oath, accompanied by an imprecation

* There is recognized a species of reversible divorce, which is effected by the husband comparing his wife to any member of his mother, or some other relation prohibited to him, which must be expiated by emancipating a slave, by alms, or by fasting. This divorce is technically termed *Zihar*.—*Hidaya*, book iv., chap. ix.

as to his wife's infidelity, and if he in the same manner deny the parentage of the child of which she is then pregnant, it will be bastardised.

Of impotency.

30. Established impotency is also a ground for admitting a claim to separation on the part of the wife.

Rules relative to parentage.

31. A child born six months after marriage is considered to all intents and purposes the offspring of the husband; so also a child born within two years after the death of the husband or after divorce.

Relative to the children of a female slave.

32. The first born child of a man's female slave is considered his offspring, provided he claim the parentage, but not otherwise; but if after his having claimed the parentage of one, the same woman bear another child to him, the parentage of that other will be established without any claim on his part.

Of acknowledgment of parentage.

33. If a man acknowledge another to be his son, and there be nothing which obviously renders it impossible that such relation should exist between them, the parentage will be established.

CHAPTER VIII.

OF GUARDIANS AND MINORITY.

Term of minority.

1. All persons, whether male or female, are considered minors until after the expiration of the sixteenth year, unless symptoms of puberty appear at an earlier period.

Sub-division of.

2. There is a sub-division of the state of minority, though not so minute as in the Civil Law, the term minor being used indiscriminately to signify all persons under the age of puberty ; but the term *Subee* is applied to persons in a state of infancy, and the term *Moorahiq* to those who have nearly attained puberty.*

Of their privileges.

3. Minors have not different privileges at different stages of their minority, as in the English law.†

* "The great distinction therefore was into majors and minors; but minors were again sub-divided into *Puberes* and *Impuberes;* and *Impuberes* again underwent a sub-division into *Infuntes* and *Impuberes*."—Summary of Taylor's Roman Law, page 124. In the Mahomedan Law a person after attaining majority is termed *Shab* till the age of thirty-four years; he is termed *Kohul* until the age of fifty-one, and *Sheikh* for the remainder of his life.

† The ages of male and female are different for different purposes. A male at twelve years old may take the oath of allegiance; at fourteen is at years of discretion, and therefore may consent or disagree to marriage, may choose his guardian, and, if his discretion be actually proved, may make his testament of his personal estate; at seventeen may be an executor, and at twenty-one is at his own disposal, and may alien his lands, goods and chattels. A female also at seven years of age may be betrothed or given in marriage; at nine is entitled to dower; at twelve is at years of maturity, and therefore may consent or disagree to marriage, and, if proved to have sufficient discretion, may bequeath her personal estate; at fourteen is at years of legal discretion,

4. Guardians are either natural or testamentary. Of guardians.

5. They are also near and remote. Of the former description are fathers and paternal grandfathers and their executors and the executors of such executors. Of the latter description are the more distant paternal kindred, and their guardianship extends only to matters connected with the education and marriage of their wards. Of the same.

6. The former description of guardians answers to the term of curator in the Civil Law, and of manager in the Bengal Code of Regulations; having power over the property of the minor for purposes beneficial to him, and in their default this power does not vest in the remote guardians, but devolves on the ruling authority. Powers of near guardians.

7. Maternal relations are the lowest species of guardians, as their right of guardianship for the purposes of education and marriage takes effect, only where there may be no paternal kindred nor mother. Guardianship of maternal relations.

8. Mothers have the right (and widows *durante viduitate*) to the custody of their sons until they attain the age of seven years, and of their daughters until they attain the age of puberty. Duration of mother's control.

9. The mother's right is forfeited by marrying a stranger, but reverts on her again becoming a widow. Special rules.

10. The paternal relations succeed to the right of guardianship, for the purposes of education and marriage, in proportion to the proximity of their claims to inherit the estate of the minor. Right of the paternal relations.

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and may choose a guardian; at seventeen may be executrix; and at twenty-one may dispose of herself and her lands.—See Blackstone's Commentaries, vol. i., page 463.

Of necessary debts.

11. Necessary debts contracted by any guardian for the support or education of his ward, must be discharged by him on his coming of age.

Disqualifications of a minor.

12. A minor is not competent *sui juris* to contract marriage, to pass a divorce, to manumit a slave, to make a loan, or contract a debt, or to engage in any other transaction of a nature not manifestly for his benefit, without the consent of his guardian.

Competency of.

13. But he may receive a gift, or do any other act which is manifestly for his benefit.

Of his immoveable property.

14. A guardian is not at liberty to sell the immoveable property of his ward, except under seven circumstances, viz. 1st, where he can obtain double its value; 2ndly, where the minor has no other property, and the sale of it is absolutely necessary to his maintenance; 3rdly, where the late incumbent died in debt which cannot be liquidated but by the sale of such property; 4thly, where there are some general provisions in the will which cannot be carried into effect without such sale; 5thly, where the produce of the property is not sufficient to defray the expences of keeping it; 6thly, where the property may be in danger of being destroyed; 7thly, where it has been usurped, and the guardian has reason to fear that there is no chance of fair restitution.

Exceptions.

Of his personal property.

15. Every contract entered into by a near guardian on behalf and for the benefit of the minor, and every contract entered into by a minor with the advice and consent of his near guardian, as far as regards his personal property, is valid and binding

upon him; provided there be no circumvention or fraud on the face of it. Exception.

16. Minors are civilly responsible for any intentional damage or injury done by them to the property or interests of others; though they are not liable in criminal matters to retaliation or to the *ultimum supplicium*, but they are liable to discretionary chastisement and correction. Responsibility of.

CHAPTER IX.

OF SLAVERY.

Of legal slavery.

1. There are only two descriptions of persons recognized as slaves under the Mahomedan Law. First, infidels made captive during war ; and, secondly, their descendants These persons are subjects of inheritance, and of all kinds of contracts, in the same manner as other property.

Slavery entire or qualified.

2. The general state of bondage is sub-divided into two classes, and slavery may be either entire or qualified, according to circumstances.

Of qualified slaves.

3. Qualified slaves are of three descriptions : the *Mookatib*, the *Moodubbir*, and the *Oom-i-wulud.*

Of a *Mookatib* slave.

4. A *Mookatib* slave is he between whom and his master there may have been an agreement for his ransom, on the condition of his paying a certain sum of money, either immediately, or at some future period, or by instalments.

Rules relative to.

5. If he fulfil the condition he will become free ; otherwise he will revert to his former unqualified state of bondage. In the mean time his master parts with the possession of, but not with the property in him. He is not however in the interval a fit subject of sale, gift, pledge or hire.

Of a *Moodubbir* slave.

6. A *Moodubbir* slave is he to whom his master has promised *post-obit* emancipation—such promise however may be made absolutely, or with limitation ; in other words, the freedom of the slave may be made to depend generally on the death of his master,

whenever that event may happen ; or it may be made conditionally, to depend on the occurrence of the event within a specified period.

Rules relative to.

7. This description of slave is not a fit subject of sale or gift, but labour may be exacted from him, and he may be let out to hire, and in the case of a female she may be given in marriage. Where the promise was made absolutely, the slave becomes free on the death of the master, whenever that event may happen ; and, where made conditionally, if his death occurred within the period specified.

Exceptions to the above general rules.

8. The general law of legacies and debts is applicable to this description of slaves, they being considered as much the right of the heirs as any other description of property : consequently they can only be emancipated to the extent of one-third of the value of their persons, where the master leaves no other property ; and they must perform emancipatory labour for the benefit of the heirs to the extent of the other two-thirds ; and where the master dies insolvent, they do not become free until, for the benefit of the deceased's creditors, they have earned by their labour, property to the full amount of their value.

Of an *Oom-i-wulud.*

9. An *Oom-i-wulud* is a female slave who has borne a child or children to her master.

Rules relative to.

10. The law is the same regarding this description of slave as regarding the *Moodubbir*, with this difference in her favor, that she is emancipated unconditionally on the death of her master ; whether he may or may not have left other assets, or whether

he may have died in a state of insolvency or otherwise. But it should be observed that the parentage of the children of such slave is not established in her master unless he acknowledge the first born.

Disqualifications of slaves.

11. Slaves labour under almost every species of legal incapacity. They cannot marry without the consent of their masters. Their evidence is not admissible nor their acknowledgments (unless they are licensed,) in matters relating to property. They are not generally eligible to fill any civil office in the state, nor can they be executors, sureties or guardians (unless to the minor children of their master by special appointment) nor are they competent to make a gift or sale, nor to inherit or bequeath property.

Indulgences granted.

12. But, as some counterpoise to these disqualifications, they are exempted from many of the obligations of freedom. They are not liable to be sued except in the presence of their masters; they are not subject to the payment of taxes, and they cannot be imprisoned for debt. In criminal matters the indulgences extended to them are more numerous.

Of licensed slaves.

13. Any description of slave however may be licensed, either for a particular purpose or generally for commercial transactions; in which case they are allowed to act to the extent of their license.

Rules relative to the marriage of.

14. Masters may compel their slaves to marry. Unqualified slaves may be sold to make good their wives' dower and maintenance, and qualified slaves may be compelled to labour for the same purposes. A man cannot marry a female slave, so long as he

has a free wife ; nor can he under any circumstances marry his own slave girl, nor can a slave marry his mistress.

Slavery of relations prohibited.

15. Persons who stand reciprocally related within the prohibited degrees cannot be the slaves of each other.

Of the issue of slaves.

16. Where issue has been begotten between the male slave of one person and the female slave of another, the maxim of *partus sequitur ventrem* applies, and the former has no legal title to the children so begotten.

Question as to a person's selling himself into slavery.

17. It is a question how far the sale of a man's own person is lawful when reduced to extreme necessity. It is declared justifiable in the *Moheet-oo-surukhsee*, a work of unexceptionable authority. But while deference is paid to that authority, by admitting the validity of the sale, it is nevertheless universally contended that the contract should be cancelled on the application of the slave, and that he should be compelled by his labour to refund the value of what he had received from his purchaser.

Of servitude.

18. It is admitted however by all authorities that a person may hire himself for any time, even though it amount to servitude for life ; but minors so hired may annul the contract on attaining majority.

CHAPTER X.

OF ENDOWMENTS.

Definition of an endowment.

1. An endowment signifies the appropriation of of property to the service of God; when the right of the appropriator becomes divested, and the profits of the property so appropriated are devoted to the benefit of mankind.

Rules relative to.

2. An endowment is not a fit subject of sale, gift or inheritance; and if the appropriation be made *in extremis*, it takes effect only to the extent of a third of the property of the appropriator. Undefined property is a fit subject of endowment.

Sale of—when allowable.

3. Endowed property may be sold by judicial authority, when the sale may be absolutely necessary to defray the expense of repairing its edifices or other indispensable purpose, and where the object cannot be attained by farming or other temporary expedient.

Grant of—to a person not in existence.

4. In case of the grant of an endowment to an individual with reversion to the poor, it is not necessary that the grantees specified shall be in existence at the time. For instance, if the grant be made in the name of the children of A with reversion to the poor, and A should prove to have no children, the grant will nevertheless be valid, and the profits of the endowment will be distributed among the poor.

Superintendent of—not removeable *quamdiu se bene gesserit.*

5. The ruling power cannot remove the superintendent of an endowment appointed by the appropriator, unless on proof of misconduct; nor can the appropriator himself remove such person, unless the li-

berty of doing so may have been specially reversed to him at the time of his making the appropriation.

Of the succession to.

6. Where the appropriator of an endowment may not have made any express provision as to who shall succeed to the office of superintendent on the death of the person nominated by himself, and he may not have left an executor, such superintendent may, on his death-bed, appoint his own successor, subject to the confirmation of the ruling power.

Rules relative to the management of.

7. The specific property endowed cannot be exchanged for other property, unless a stipulation to this effect may have been made by the appropriator, or unless circumstances should render it impracticable to retain possession of the particular property, or unless manifest advantage be derivable from the exchange; nor should endowed lands be farmed out on terms inferior to their value, nor for a longer period than three years, except when circumstances render such measure absolutely necessary to the preservation of the endowment.

Cases in which the will of the founder may be contravened.

8. The injunctions of the appropriator should be observed except in the following cases: If he stipulate that the superintendent shall not be removed by the ruling authorities, such person is nevertheless removeable by them on proof of misconduct. If he stipulate that the appropriated lands shall not be let out to farm for a longer period than one year, and it be difficult to obtain a tenant for so short a period, or, by making a longer lease, it be better calculated to promote the interests of the establishment, the ruling authorities are at liberty to act without the con-

sent of the superintendent. If he stipulate that the excess of the profits be distributed among persons who beg for it in the mosque, it may nevertheless be distributed in other places and among the necessitous, though not beggars. If he stipulate that daily rations of food be served out to the necessitous, the allowance may nevertheless be made in money. The ruling authorities have power to increase the salaries of the officers attached to the endowment, when they appear deserving of it, and the endowed property may be exchanged, when it may seem advantageous, by order of such authorities; even though the appropriator may have expressly stipulated against an exchange.

Case of two superintendents.

9. Where an appropriator appoints two persons joint superintendents, it is not competent to either of them to act separately; but where he himself retains a moiety of the superintendence, associating another individual, he (the appropriator) is at liberty to act singly and of his own authority in his self-created capacity of joint superintendent.

General rule for public and private endowments.

10. Where an appropriation has been made by the ruling power, from the funds of the public treasury, for public purposes, without any specific nomination, the superintendence should be entrusted to some person most deserving in point of learning; but in private appropriations, with the exceptions above mentioned, the injunctions of the founder should be fulfilled.

CHAPTER XI.

OF DEBTS AND SECURITIES.

Responsibility of heirs.

1. Heirs are answerable for the debts of their ancestors, as far as there are assets.

Of debts acknowledged on a death-bed.

2. The payment of debts ackonwledged on a death-bed must be postponed until after the liquidation of those contracted in health, unless it be notorious that the former were *bonâ fide* contracted ; and a death-bed acknowledgment of a debt in favor of an heir is entirely null and void, unless the other heirs admit that it is due.

Case of two persons jointly contracting a debt.

3. If two persons jointly contract a debt and one of them die, the survivor will be held responsible for a moiety only of the debt ; unless there was an express stipulation that each should be liable for the whole amount : for the law presumes that each were equal participators in the profits of the loan, and that one should not be responsible for the share of advantage acquired by the other.

And being joint sureties.

4. So also where two persons are joint sureties for the payment of a debt, if one of them die, the survivor will not be considered as surety for the whole debt ; unless there was an express stipulation that each should be surety for the whole, and that the one should be surety of the other.

In certain cases partners are jointly and severally responsible.

5. It is different where two partners are engaged in traffic, contributing the same amount in capital, and being equal in all respects, in which case the one partner is responsible for all acts done and for all

debts contracted by the other. But this is not the case with regard to other partnerships, in which cases a creditor of the concern cannot claim the whole debt from any one of the partners severally, but must either come upon the whole collectively, or if he prefer his claim against any one individual partner, it must be only to the extent of his share.

Of necessary debts contracted by guardians.

6. Necessary debts contracted by a guardian on account of his ward must be discharged by the latter on his coming of age.

Inhibition of debtors.

7. A general inhibition cannot be laid on a debtor to exclude him entirely from the management of his own affairs; but he may be restrained from entering into such contracts as are manifestly injurious to his creditor.

Proof of debt by confession and by evidence.

8. If a debtor, on being sued, acknowledge the debt, he must not be immediately imprisoned; but if he deny, and it be established by evidence, he should be committed forthwith to jail.

Case of procrastinating debtors.

9. If, after judgment, there should be any procrastination on the part of a debtor who has been suffered to go at large, and he may have received a valuable consideration for the debt, or if it be a debt on beneficial contract, he should be committed to jail notwithstanding he plead poverty.

Special rule in certain cases.

10. But if the debt had been contracted gratuitously and without any valuable consideration having been received (as in the case of a debt contracted by a surety on account of his principal), the debtor should not be imprisoned unless the creditor can establish his solvency.

11. It is left discretionary with the judicial authorities to determine the period of imprisonment in cases of apparent insolvency. Imprisonment how determinable.

12. But the liberation of a debtor does not exempt him from all future pursuit by his creditors. They may cause his arrest at a subsequent period, on proof of his ability to discharge the debt. Liberation no bar to subsequent arrest.

13. In the attachment and sale of property belonging to a debtor, great caution is prescribed. In the first instance, his money should be applied to the liquidation of his debt; next, his personal effects; and last of all, his houses and lands. Of attachment and sale.

14. There is no distinction between mortgages of lands and pledges of goods. Of mortgages and pledges.

15. Hypothecation is unknown to the Mahomedan law, and seizin is a requisite condition of mortgage. Of hypothecation.

16. The creditor is not at liberty to alienate and sell the mortgage or pledge at any time, unless there was an express agreement to that effect between him and the debtor, as the property mortgaged is presumed to be equivalent to the debt, and as the debt cannot receive any accession, interest being prohibited. Of mortgages.

17. It is a general rule that the pawnee is chargeable with the expence of providing for the custody, and the pawner with the expence of providing for the support of the thing pledged; for instance, in the case of a pledge of a horse, it is necessary that the pawner should provide his food, and the pawnee his stable. Obligations of mortgagor and mortgagee.

Mortgagee cannot use the pledge.

18. Where property may have been pawned or mortgaged in satisfaction of a debt, it is not lawful for the pawnee or mortgagee to use it without the consent of the pawner or mortgagor, and if he do so, he is responsible for the whole value.

Mortgage destroyed in the mortgagee's hands.

19. Where such property, being equivalent to the debt, may have been destroyed, otherwise than by the act of the pawnee or mortgagee, the debt is extinguished ; where it exceeds the debt, the pawnee or mortgagee is not responsible for the excess, but where it falls short of the debt, the deficiency must be made up by the pawner or mortgagor ; but if the property were wilfully destroyed by the act of the pawnee or mortgagee, he will be responsible for any excess of its value beyond the amount of the debt.

Privilege of a mortgagee.

20. If a person die, leaving many creditors, and he may have pawned or mortgaged some property to one of them, such creditor is at liberty to satisfy his own debt out of the property of the deceased debtor, which is in his own possession, to the exclusion of all the other creditors.

CHAPTER XII.

OF CLAIMS AND JUDICIAL MATTERS.

1. There is no rule of limitation to bar a claim of right according to the Mahomedan law.* No limitation.

2. A claim founded on a verbal engagement is of equal weight with a claim founded on a written engagement. Parole and writing equally valid.

3. Informality in a deed does not vitiate a contract founded thereon, provided the intention of the contracting parties can otherwise be clearly ascertained. Of informal deeds.

4. The general rule with respect to all claims is that priority in point of time confers superiority of right. Of priority.

5. Where the priority of either cannot be ascertained, a claim founded on purchase is entitled to the preference over a claim founded on gift. Conflicting claims of purchase and gift.

6. Contracts are not dissolved generally by the death of one of the contracting parties, but they devolve on the representatives as far as there may be assets; unless the subject of the contract be of a personal nature, such for instance as in the case of a lease, if either the landlord or farmer die, the contract ceases on the occurrence of that event. Contracts generally devolve. Exceptions.

7. So also in the case of partnership and joint concerns of any description, where the surviving Additional exception.

* In the *Buhrooraiyiq* an opinion is cited from the *Mubsoot*, to the effect that if a person causelessly neglect to advance his claim for a period of thirty-three years, it shall not be cognizable in a court of justice; but this opinion is adverse to the received legal doctrine.

partners are not bound to continue in business with the heirs of the deceased partner, and *vice versâ*; and the obligation is extinguished, as well by civil as by natural death.

Of witnesses.

8. Oaths are not administered to witnesses.

Their number.

9. In civil claims the evidence of two men or one man and two women is generally requisite.

Incompetent witnesses.

10. Slaves, minors and persons convicted of slander are not competent witnesses.

Inadmissible evidence.

11. The evidence of a father or grandfather, in favor of his son or his grandson, and *vice versâ*; of a husband in favor of his wife, and *vice versâ*, and of a servant in favor of his master, and *vice versâ*, is not admissible.

Of the same.

12. Nor is the evidence of a partner admissible in matters affecting the joint concern.

Female evidence, where admissible.

13. In matters which fall peculiarly within the province of women, female evidence is admissible, uncorroborated by male testimony.

And hearsay evidence.

14. Hearsay evidence is admissible to establish birth, death, marriage, cohabitation and the appointment of a Kazee; as the eye witnesses to such transactions are frequently not forthcoming.

Superfluous evidence.

15. No respect is paid to any superiority in the number of witnesses above the prescribed number adduced in support of a claim.

Of evidence exceeding the claim.

16. The evidence of witnesses which tends to establish the plaintiff's claim to any thing not contained in his own statement, must be rejected; for instance, if any of his witnesses depose to a larger sum being due to him than that claimed by himself.

17. The evidence of witnesses which tends to establish the plaintiff's claim on a ground different from that alleged by himself, must be rejected; for instance, if the plaintiff were to claim by purchase and his witnesses were to depose to his claim being founded on gift.

And differing as to the ground of action.

18. Where a debt is claimed, and some of the witnesses depose to the debt of the whole sum claimed and others to a part of it only, the plaintiff is entitled to such part only of the sum claimed.

Where it differs as to the amount due.

19. Where a defendant pleads the general issue, the *onus probandi* rests on the plaintiff.

Of the general issue.

20. Where a plea contains defensive matter, such as payment or satisfaction, the *onus probandi* rests on the defendant; the rule being the same as in the Civil Law, that in every issue the affirmative is to be proved.

Of a special plea containing defensive matter.

21. A defendant may in some cases plead both the general issue and special plea, where they are not inconsistent; and the *onus probandi* in such case rests on the plaintiff, where the special plea is not necessary to the defence; for instance, a man sues another for half an estate, alleging that he was born in wedlock of the same father and mother as the defendant. Here the defendant may deny the allegation generally, and at same time plead that the plaintiff was born of a different family.

Of the junction of a special plea and the general issue.

22. A claim is not admissible which may be repugnant to a former claim, both of which cannot stand; for instance, a person in a former suit having denied that a certain individual was his brother, can-

A claim at variance with a former one inadmissible.

not subsequently claim the inheritance of that person on the plea of such relation.

Unless they can both consistently stand.

23. But if the claim be at variance with a former one, and they can both consistently stand, it is admissible; for instance, a claim having been advanced to property in virtue of purchase, the same property may be claimed by the same person in virtue of inheritance, but if the claim of inheritance had been prior, a subsequent claim of purchase is not admissible; as it is manifest that they cannot both consistently stand.*

Rule where the plaintiff has no evidence.

24. If a man adduce a claim and have no evidence to support it, the general rule is, that the defendant must be put to his oath, and if he decline swearing, judgment should be given for the plaintiff; but if he deny on oath, he is absolved from the claim.

And where both parties have evidence.

25. Where both parties have evidence, that of the plaintiff is generally entitled to preference. Thus, for instance, where the creditor and debtor are at issue as to the amount of a debt, and both parties have evidence, that of the former is entitled to preference, but where neither party has evidence, the assertion on oath of the latter is to be credited.

Examples.

Additional rule where both parties have evidence.

26. It is also a general principle that where there is evidence adduced on both sides, *cæteris paribus*,

* At first sight there might appear to be a distinction without a difference in this case; but the reason of the rule is that an heir might consistently make a purchase of property which had not devolved, but of which he was in expectancy. But it is contrary to all probability that he should have purchased, after the demise of the ancestor, property to which he had represented himself actually entitled in virtue of inheritance.

the preference should be given to the witnesses of the party whose claim is greater, or who has the greater interest in the subject matter. Thus, for instance, in an action arising out of a contract of sale, where there is a disagreement about the price between the seller and purchaser, both parties having evidence, the witnesses who depose to the larger sum being due, that is of the plaintiff, are entitled to preference.

Example.

27. And where there is a disagreement, both as to the price and goods, both parties having witnesses, the evidence adduced by the seller is entitled to preference, as far as it affects the amount of the price, and that of the purchaser as far as it affects the quality and quantity of the goods.

Case of sale, the parties being at issue both as to the price and the goods, and each having evidence.

28. If neither party have evidence, they should both be put to their oaths, and if both consent to swear, the contract must be dissolved; but if one decline and the other swear, the decree should be passed in favour of the swearer.

And where neither has evidence.

29. But if the disagreement exist with respect to the conditions only of a sale, such as the period of payment, &c., and both parties consent to swear, the assertion on oath of the party against whom the claim is made is entitled to preference.

And where they are at issue as to the condition of a sale.

30. Where a husband and wife dispute as to the amount of dower, both parties having evidence, that of the wife must be credited, as it proves most;* so

Suit between husband and wife, or between lessor and lessee.

* But there is an exception to this general rule. If the proper dower of the wife, that is to say the average rate of dower paid to her paternal female relations, exceed the amount claimed by her, the evidence adduced by the husband is entitled to preference, because that goes to prove some remission on her part. See *Hidaya*, vol. i., page 154.

also in a dispute between a lessor and lessee, the evidence of each party is entitled to preference as far as their individual interests are at stake ; the evidence of the lessor being received as to the amount of the rent, and that of the lessee as to the duration of the term.

Claim of property in deposit or in pledge.

31. Where property is claimed and the person in whose possession it is, states that he is merely a depositary or pawnee of an absent proprietor, and adduces evidence in support of his assertion, the claim must be dismissed ; but the claim should be rejected *in limine* where the claimant admits his title to have been derived from such absentee proprietor.

Of *exparte* judgment.

32. Judgment cannot be passed *exparte*, the reason given being, that decisions must be founded either on the defendant's confession, or (notwithstanding his denial) on proof by witnesses ; and where he is absent, it cannot be said whether he would have denied or admitted the claim.

Of arbitration.

33. When cases are referred to arbitration, it is requisite that the decision of the arbitrators should be unanimous.

APPENDIX,

Containing the Regulation VII. of 1832, Sections VIII. and IX., Acts XXI. of 1850, XV. of 1856, and XXI. of 1870.

REGULATION VII.—A. D. 1832.

A Regulation for modifying certain of the Provisions of Regulation V., 1831, *and for providing supplementarg Rules to that enactment: Passed by the Vice-President in Council on the* 16*th October*, 1832.

VIII. Such part of Clause second, Section III., Regulation VIII., 1795, enacted for the province of Benares, which declares that "in causes in which the plaintiff shall be of a different religious persuasion from the defendant, the decision is to be regulated by the law of the religion of the latter, excepting where Europeans or other persons, not being either Mahomedans or Hindus, shall be defendants, in which case the law of the plaintiff is to be made the rule of decision in all plaints or actions of a civil nature," is hereby rescinded, and the rules contained in Section XV., Regulation IV., 1793, and the corresponding enactment contained in Clause first, Section XVI., Regulation III., 1803, shall be the rule of guidance in all suits regarding succession, inheritance, marriage, and caste, and all religious usages and institutions that may arise between persons professing the Hindu and Mahomedan persuasions respectively.

IX. It is hereby declared, however, that the above rules are intended and shall be held to apply to such persons only as shall be *bonâ fide* professors of those religions at the time of the application of the law to the case, and were designed for the protection of the rights of such persons, not for the deprivation of the rights of others. Whenever, therefore, in any civil suit, the parties to such suit may be of different persuasions, when one party shall be of the Hindu, and the other of the Mahomedan persuasion, or when one or more of the parties to the suit shall not be either of the Mahomedan or Hindu persuasions, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled. In all such cases the decision shall be governed by the principles of justice, equity, and good conscience: it being clearly understood, however, that this provision shall not be considered as justifying the introduction of the English or any foreign law, or the application to such cases of any rules not sanctioned by those principles.

ACT XXI. OF 1850.

An Act for extending the principle of Section 9, Regulation VII., 1832, of the Bengal Code, throughout the territories subject to the Government of the East India Company.

Preamble.

WHEREAS it is enacted by Section IX., Regulation VII., 1832, of the Bengal Code, that "whenever in any civil suit the parties to such suit may be of different persuasions, when one party shall be of the Hindu, and the other of the Mahomedan persuasion, or where one or more of the parties to the suit shall not be either of the Mahomedan or Hindu persuasions, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled;" and whereas it will be beneficial to extend the principle of that enactment throughout the territories subject to the government of the East India Company: It is enacted as follows:—

I. So much of any law or usage now in force within the territories subject to the government of the East India Company as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories.

ACT XV. OF 1856.

An Act to remove all legal obstacles to the Marriage of Hindu Widows.

Preamble.

WHEREAS it is known that, by the law as administered in the Civil Courts established in the territories in the possession and under the government of the East India Company, Hindu widows, with certain exceptions, are held to be, by reason of their having been once married, incapable of contracting a second valid marriage, and the offspring of such widows by any second marriage are held to be illegitimate and incapable of inheriting property: and whereas many Hindus believe that this imputed legal incapacity, although it is in accordance with established custom, is not in accordance with a true interpretation of the precepts of their religion, and desire that the civil law administered by the courts of justice shall no longer prevent those Hindus who may be so minded from adopting a different custom, in accordance with the dictates of their own consciences: and whereas it is just to relieve all such Hindus from their legal incapacity of which they complain; and the removal of all legal obstacles to the marriage of Hindu widows will tend to the promotion of good morals and to the public welfare: It is enacted as follows:—

Marriage of Hindu widows legalized.

I. No marriage contracted between Hindus shall be invalid, and the issue of no such marriage shall be illegitimate, by reason of the woman having been previously married or betrothed to another person who was dead at the time of such marriage, any custom and any interpretation of Hindu law to the contrary notwithstanding.

Rights of widow in deceased husband's property to cease on her re-marriage.

II. All rights and interests which any widow may have in her deceased husband's property by way of maintenance, or by inheritance to her husband or to his lineal successors, or by virtue of any will or testamentary disposition conferring upon her, without express permission to re-marry, only a limited interest in such property, with no power of alienating the same, shall upon her re-marriage cease and determine as if she had then died: and the next heirs of her deceased husband, or other persons entitled to the property on her death, shall thereupon succeed to the same.

Guardianship of children of deceased husband on the re-marriage of his widow.

III. On the re-marriage of a Hindu widow, if neither the widow nor any other person has been expressly constituted by the will or testamentary disposition of the deceased husband the guardian of his children, the father or paternal grandfather, or the mother or paternal grandmother, of the deceased husband, or any male relative of the deceased husband, may petition the highest Court having original jurisdiction in civil cases in the place where the deceased husband was domiciled at the time of his death, for the appointment of some proper person to be guardian of the said children, and thereupon it shall be lawful for the said Court, if it shall think fit to appoint such guardian, who, when appointed, shall be entitled to have the care and custody of the said children, or of any of them, during their minority, in the place of their mother: and in making such appointment the Court shall be guided, so far as may be, by the laws and rules in force touching the guardianship of children who have neither father nor mother. Provided that, when the said children have not property of their own sufficient for their support and proper education whilst minors, no such appointment shall be made otherwise than with the consent of the mother, unless the proposed guardian shall have given security for the support and proper education of the children whilst minors.

Nothing in this Act to render any childless widow capable of inheriting.

IV. Nothing in this Act contained shall be construed to render any widow, who, at the time of the death of any person leaving any property, is a childless widow, capable of inheriting the whole or any share of such property, if, before the passing of this Act, she would have been incapable of inheriting the same by reason of her being a childless widow.

Saving of rights of widow marrying, except as provided in the three preceding sections.

V. Except as in the three preceding sections is provided, a widow shall not, by reason of her re-marriage, forfeit any property or any right to which she would otherwise be entitled; and every widow who has re-married shall have the same rights of inheritance as she would have had, had such marriage been her first marriage.

VI. Whatever words spoken, ceremonies performed, or engagements made on the marriage of a Hindu female who has not been previously married are sufficient to constitute a valid marriage, shall have the same effect, if spoken, performed, or made on the marriage of a Hindu widow; and no marriage shalll be declared invalid on the ground that such words, ceremonies, or engagements are inapplicable to the case of a widow.

Whatever ceremonies now constitute a valid marriage shall have the same effect on the marriage of a widow.

VII. If the widow re-marrying is a minor whose marriage has not been consummated, she shall not re-marry without the consent of her father, or if she has no father, of her paternal grandfather, or if she has no such grandfather, of her mother, or failing all these, of her elder brother, or failing also brothers, of her next male relative. All persons knowingly abetting a marriage made contrary to the provision of this section, shall be liable to imprisonment for any term not exceeding one year, or to fine, or to both. And all marriages made contrary to the provisions of this section may be declared void by a court of law. Provided that, in any question regarding the validity of a marriage made contrary to the provisions of this section, such consent as is aforesaid shall be presumed until the contrary is proved, and that no such marriage shall be declared void after it has been consummated. In the case of a widow who is of full age, or whose marriage has been consummated, her own consent shall be sufficient consent to constitute her re-marriage lawful and valid.

Consent to re-marriage of a widow who is a minor.

Punishment for abetting re-marriage made contrary to this section.

Effect of such marriage.

Proviso.

ACT XXI. OF 1870.

PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.
(RECEIVED THE ASSENT OF THE GOVERNOR-GENERAL ON THE 19TH JULY, 1870.)

An Act to regulate the Wills of Hindus, Jainas, Sikhs, and Buddhists, in the Lower Provinces of Bengal and in the Towns of Madras and Bombay.

WHEREAS it is expedient to provide rules for the execution, attestation, revocation, revival, interpretation, and probate of the wills of Hindus, Jainas, Sikhs, and Buddhists in the territories subject to the Lieutenant-Governor of Bengal, and in the towns of Madras and Bombay; It is hereby enacted as follows:—

Preamble.

1. This Act may be called "The Hindu Wills Act, 1870."

Short title.

2. The following portion of the Indian Succession Act, 1865, namely,—
Sections 46, 48, 49, 50, 51, 55, and 57 to 77 (both inclusive),
Sections 82, 83, 85, 88 to 133 (both inclusive),
Sections 106 to 177 (both inclusive),
Sections 179 to 189 (both inclusive),
Sections 191 to 199 (both inclusive),
So much of Parts XXX. and XXXI. as relates to grants of probate and letters of administration with the will annexed, and Parts XXXIII. to XL. (both inclusive) so far as they relate to an executor and an administrator with the will annexed,
shall, notwithstanding anything contained in section 331 of the said Act, apply—

Extent of Act.

(a) to all wills and codicils made by any Hindu, Jaina, Sikh, or Buddhist, on or after the first day of September 1870, within the said territories or the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and

(b) to all such wills and codicils made outside these territories and limits, so far as relates to immoveable property situate within those territories or limits:

Provisos.

3. Provided that marriage shall not revoke any such will or codicil:

And that nothing herein contained shall authorise a testator to bequeath property which he could not have alienated *inter vivos*, or to deprive any persons of any right of maintenance of which, but for section 2 of this Act, he could not deprive them by will:

And that nothing herein contained shall vest in the executor or administrator with the will annexed of a deceased person any property which such person could not have alienated *inter vivos:*

And that nothing herein contained shall effect any law of adoption or intestate succession:

And that nothing herein contained shall authorise any Hindu, Jaina, Sikh, or Buddhist to create in property any interest which he could not have created before the first day of September 1870.

Partial repeal of Bengal Regulation V. of 1799, Section 2.

4. On and from that day, section two of Bengal Regulation V. of 1799 shall be repealed so far as relates to the executors of persons who are not Mahomedans, but are subject to the jurisdiction of a District Court in the territories subject to the Lieutenant-Governor of Bengal.

Saving of rights of Administrator-General.

5. Nothing contained in this Act shall affect the rights, duties, and privileges of the Administrators-General of Bengal, Madras, and Bombay, respectively.

Interpretation clause.

6. In this Act and in the said sections and parts of the Indian Succession Act, all words defined in section 3 of the same Act shall, unless there be something repugnant in the subject or context, be deemed to have the same meaning as the said section 3 has attached to such words, respectively.

And, in applying sections 62, 63, 92, 96, 98, 99, 100, 101, 102, 103, and 182 of the said Succession Act to wills and codicils made under this Act, the words "son," "sons," "child," and "children" shall be deemed to include an adopted child; and the word "grand-children" shall be deemed to include the children, whether adopted or natural-born, of a child whether adopted or natural-born; and the expression "daughter-in-law" shall be deemed to include the wife of an adopted son. And in making grants under this Act of letters of administration with the will annexed, or with a copy of the will annexed, section 195 of the said Succession Act shall be construed as if the words "and in case the Hindu Wills Act had not been passed" were added thereto, and section 198 of the said Succession Act shall be construed as if, after the word "intestate" the words "and the Hindu Wills Act had not been passed" were inserted; and sections 230 and 231 of the said Succession Act shall be construed as if the words "if the Hindu Wills Act had not been passed" were added thereto, respectively.

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